(1)

No. 96-7151-CFY
Status: GRANTED

Title: Debra Faye Lewis, Petitioner
v.
United States

Docketed:
December 20, 1996

Court: United States Court of Appeals for the Fifth Circuit

Counsel for petitioner: Granger,Frank

Counsel for respondent: Solicitor General, Hudsmith,Rebecca L.

Entry	Date	Note	Proceedings and Orders
1	Dec 16 1996	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due April 2, 1997)
3	Dec 30 1996		Waiver of right of respondent United States to respond filed.
4	Jan 9 1997		DISTRIBUTED. February 14, 1997 (Page 10)
5	Jan 30 1997	F	Response requested -- DHS.
6	Feb 27 1997		Order extending time to file response to petition until April 2, 1997.
7	Mar 28 1997		Brief of respondent United States in opposition filed. VIDED.
8	Apr 10 1997		REDISTRIBUTED. April 23, 1997 (Page 5)
10	May 5 1997		REDISTRIBUTED. May 8, 1997 (Page 25)
12	May 12 1997		Petition GRANTED. SET FOR ARGUMENT November 12, 1997. **********
13	May 13 1997		The order granting the petition for a writ of certiorari is amended to read: The motion of petitioner for leave to proceed in forma pauperis is granted. The petition for a writ is granted limited to the following question: Whether petitioner was properly charged and convicted for the murder of her four-year old stepdaughter under the Assimilative Crimes Act, 18 U.S.C. Sec. 13, and the Louisiana child murder statute, 14 La. Rev. State. Ann. Sec. 30A(5), and if not, whether the sentence was proper?
14	Jun 6 1997	G	Motion of James M. Lewis for leave to proceed further herein in forma pauperis filed.
15	Jun 6 1997	N	Motion of James M. Lewis for leave to file a brief as respondent in support of petitioner filed.
16	Jun 16 1997		DISTRIBUTED. June 19, 1997 (Page 15)
18	Jun 16 1997		Order extending time to file brief of petitioner on the merits until July 25, 1997.
19	Jun 23 1997		Motion of James M. Lewis for leave to proceed further herein in forma pauperis GRANTED.
23	Jul 25 1997		Brief of petitioner Debra Faye Lewis filed.
24	Jul 25 1997		Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
20	Jul 26 1997		Joint appendix filed.
27	Aug 14 1997		Record filed.
		*	Partial record proceedings United States Court of

1 pp

No. 96-7151-CFY

Entry	Date	Note	Proceedings and Orders
			Appeals for the Fifth Circuit.
26	Aug 22 1997		Order extending time to file brief of respondent on the merits until September 5, 1997.
28	Sep 5 1997		Brief of respondent United States filed.
29	Sep 16 1997		CIRCULATED.
30	Oct 14 1997	X	Reply brief of petitioner Debra Faye Lewis filed.
31	Nov 10 1997		Record filed.
		*	Record proceedings United States District Court, for the Western District of Louisiana.
32	Nov 12 1997		ARGUED.

(2)

NUMBER 96-7151

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1996

DEBRA FAYE LEWIS,
Petitioner

versus

UNITED STATES OF AMERICA,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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65 pp

QUESTIONS PRESENTED

CAN THE COURT OF APPEALS ENTER A JUDGMENT OF CONVICTION UNDER AN "ANALOGOUS" FEDERAL STATUTE IN LIEU OF THE CONVICTION UNDER AN IMPROPERLY ASSIMILATED STATE STATUTE AT TRIAL, WHEN DOING SO IS NOT HARMLESS ERROR AND CAUSES SUBSTANTIAL PREJUDICE TO THE DEFENDANT'S RIGHTS?

CAN THE COURT OF APPEALS REFUSE TO APPLY THE MANDATORY SENTENCING GUIDELINES TO DEFENDANT'S CONVICTION ON THE ANALOGOUS FEDERAL SECOND DEGREE MURDER STATUTE AND IMPOSE A SENTENCE ON THE DEFENDANT THAT EXCEEDS THE MAXIMUM SENTENCING GUIDELINE RANGE?

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NUMBER _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1996

DEBRA FAYE LEWIS,
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versus

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FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

The petitioner, **DEBRA FAYE LEWIS**, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, which, on direct appeal, affirmed petitioner's conviction and sentence.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit sought to be reviewed, United States v. Lewis, No. 95-30860 (5th Cir. August 19, 1996), appears as Appendix A, and its denial of petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc on September 16, 1996, as appears as Appendix B.

JURISDICTION

On August 19, 1996, the United States Court of Appeals for the Fifth Circuit rendered its decision on direct appeal of petitioner's conviction and sentence under jurisdictional authority of 28 U.S.C. §1254(1), and on September 16, 1996, the United States Court of Appeals for the Fifth Circuit denied petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fed. Rules of Cr. Proc. rule 7, 18 U.S.C.A., provides:

7(c)(3) Harmless Error:

> "Error in the citation or submission shall not be grounds for dismissal of the indictment or information or for reversal of the conviction if the error or omission did not mislead the defendants or the defendants were prejudiced."

Fed. Rules of Cr. Proc. rule 52(a) provides:

> "Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded."

LSA-R.S. 14:30A(5) provides:

> "A. First degree murder is the killing of a human being:
>
> (5) When the offender has the specific intent to kill or inflict great bodily harm upon a victim under the age of 12 years or sixty-five years of age or older."

18 USC § 1111(a) provides:

> "Murder is the unlawful killing of a human being with malice aforethought. Every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing; or committed in the perpetration of, or attempt to perpetrate, any arson, escape, murder, kidnapping, treason, espionage, sabotage, aggravated sexual abuse or sexual abuse, burglary, or robbery; or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed, is murdered in the first degree. Any other murder is murder in the second degree.

The Court of Appeals held that the indictment which improperly charged defendant under the Louisiana first degree murder statute in violation of the provisions of the Assimilative Crimes Act, did not require a reversal of the conviction because the error or omission did not mislead the defendant to the defendant's prejudice nor did it substantially affect the defendant's rights. The Court of Appeals further found that because the federal second degree murder statute was most closely analogous or akin to the Louisiana first degree murder statute, and that the two statutes shared the similar elements of proof, then the court was permitted to enter a judgment of conviction of defendant pursuant to the federal second degree murder statute.

Defendant believes that the interpretation by the Court of Appeals is erroneous and that a reversal of the conviction is required because the defendant was mislead to her prejudice and that the entering of a conviction under the federal statue for which she was not indicted, prosecuted, or tried, substantially affected her rights.

United States Sentencing Guidelines

§2A1.2 Second Degree Murder provides:

a) Base Offense Level: 33

§3A1.1 Vulnerable Victim provides:

> "If the defendant knew or should have known that a victim of the offense was unusually vulnerable due to age, physical or mental condition, or that a victim was otherwise particularly susceptible to the criminal conduct, increase by 2 levels."

The mandatory application of the Sentencing Guidelines to the analogous federal crime of second degree murder of which the Court of Appeals convicted petitioner, mandates a sentence less than life imprisonment which was imposed. The Sentencing Guidelines provide for a Base Offense Level of 33 and a term of imprisonment range of 135-168 months; if the Base Offense Level is enhanced 2 points by the application of guideline §3A1.1, Vulnerable Victim, the guideline range of imprisonment is 168 - 210 months. The term of life imprisonment imposed by the Court of Appeals exceeds the statutory maximum and it must be vacated and this matter remanded for resentencing.

STATEMENT OF THE CASE

This case raises two important issues of federal criminal law: prosecution under the Assimilative Crimes Act (ACA), 18 USC §§ 7 and 13 and the mandatory application of the United States Sentencing Commission Guidelines, specifically Section 2A1.2, to the

conviction imposed on defendant by the Court of Appeals and whether the failure of the Court of Appeals to consider the mandator application of the Sentencing Guidelines require that this matter be remanded for sentencing.

The Fifth Circuit held that the government's indictment assimilating state substantive criminal law through the ACA was improper. The Court of Appeals held that the federal murder statutes preempted the field and the federal prosecution could not be based upon an improper assimilative of the Louisiana first degree murder statute.

However, the Fifth Circuit Court of Appeals held that this improper assimilation of the Louisiana first degree murder statute merely rendered the indictment defective and not fatally flawed; therefore, no reversal of the conviction or remand for new trial was necessary. The Fifth Circuit merely entered a conviction against petitioner, DEBRA FAYE LEWIS, of federal second degree murder, 18 USC §1111, which it found most analogous to the Louisiana first degree murder statute.

The Fifth Circuit should have reversed the conviction and remanded for a new trial. Once the prosecution on the assimilated state statute was deemed improper, the trial court, and consequently, the Court of Appeals had no jurisdiction to enter a conviction of an analogous federal crime for which the defendant had not been charged.

The Fifth Circuit entered a conviction of a analogous federal statute: second degree murder. However, the Court of Appeals failed to apply the mandatory sentencing guidelines which mandated a lesser sentence than that imposed by the district court. The Court of Appeals entered a sentence of life imprisonment (the same as that imposed by

the trial court as mandatory under the state first degree murder statute and under the Sentencing Guidelines for federal first degree murder) which was a far greater punishment than provided by the sentencing guideline for federal second degree murder, Section 2A1.2. The Court of Appeals held the punishment was within the maximum statutory punishment and failed to consider the mandatory sentencing guidelines which imposed a lesser term of imprisonment. The Court of Appeals held that no remand for resentencing was necessary as the sentence imposed was not greater than that provided by statute or that imposed by the trial court. This reasoning is clearly erroneous and the decision is clearly contrary to the statutory mandates of the sentencing guidelines and the prohibitions of the Assimilative Crimes Act.

A. Course of Proceedings and Disposition Below

DEBRA FAYE LEWIS was arrested on or about December 21, 1993 at Fort Polk, Vernon Parish, Louisiana, in the Western District of Louisiana for first degree murder in violation of Louisiana Revised Statutes 14:30A (5) pursuant to the Assimilative Crimes Act, 18 U.S.C. Sections 7 and 13. The alleged crime occurred at Fort Polk, a military reservation which is an area of exclusive federal jurisdiction.

DEBRA FAYE LEWIS and her co-defendant and husband, JAMES M. LEWIS, were brought before the United States Magistrate on an initial appearance on December 21, 1993. Mr. and Ms. Lewis were detained after a hearing. An indictment was filed on or about January 4, 1994 formally charging DEBRA FAYE LEWIS with first degree murder pursuant to Louisiana law, LSA-R.S. 14:30A(5) as assimilated by the Assimilated Crimes

Act. An arraignment was conducted on January 20, 1994 at which time Ms. Lewis entered a plea of not guilty to the charge. On or about February 11, 1994, counsel for DEBRA FAYE LEWIS filed a Motion to Dismiss Indictment urging that the indictment improperly charged the defendant under the Louisiana first degree murder statute, LSA-R.S. 14:30A (5) through the Assimilative Crimes Act, 18 USC §§ 7 and 13 rather than pursuant to the federal murder statute, 18 U.S.C. Section 1111. By judgment dated April 5, 1994, mailed on April 7, 1994, and received on April 14, 1994, the district court denied the motion to dismiss the indictment. The defendant appealed that ruling on April 15, 1994. The United States Court of Appeals for the Fifth Circuit dismissed the appeal on July 28, 1994 because it found the trial court's ruling to be interlocutory and not a final judgment.

This matter was tried before a jury on March 6 - 10, 1995 and March 13 - 14, 1995. The jury found DEBRA FAYE LEWIS guilty of first degree murder pursuant to the Louisiana first degree murder statute on March 14, 1995.

A sentencing hearing was held on August 22, 1995. DEBRA FAYE LEWIS was sentenced to a mandatory prison term of life imprisonment pursuant to the Louisiana first degree murder statutes and the Sentencing Guidelines for federal first degree murder: U.S.S.G. § 3A1.1. A Notice of Appeal was filed on August 30, 1995.

On August 19, 1996, the Fifth Circuit issued its opinion in which it upheld the conviction and sentence under the federal second degree murder statute and not under state law as alleged in the indictment. The Fifth Circuit denied defendant's Petition for Rehearing and Suggestion for Rehearing En Banc on September 16, 1996.

B. Statement of the Facts

On August 19, 1996, the Fifth Circuit issued its opinion. That opinion held that the government improperly indicted the defendant by assimilating the Louisiana first degree murder statute pursuant to the Assimilative Crimes Act. The court held that the federal murder statutes preempted the field. However, the Fifth Circuit held that a reversal of the conviction and remand for retrial was unnecessary because the indictment was merely "defective and not fatally flawed." The Court of Appeals reasoned that the defendant was not prejudiced by the error and that the evidence supported a conviction under the federal second degree murder statute which the court found analogous to and requiring the same elements of proof as the Louisiana first degree murder statute.

Further, the Fifth Circuit determined that the case need not be remanded for resentencing because the sentence of life imprisonment imposed by the trial court was within the statutory maximum allowed by the federal second degree murder statute. Therefore, a sentence of life imprisonment was imposed. The Fifth Circuit failed to consider or apply the relevant and mandatory Sentencing Guidelines to the crime of which it convicted the defendant. The Sentencing Guidelines for federal second degree murder are mandatory and set out a guideline range far less than life imprisonment: U.S.S.G. § 2A1.2. The Court of Appeals committed clear error in imposing a sentence without considering or applying the Sentencing Guidelines, and without remanding for resentencing.

These errors were raised by defendant in her Petition for Rehearing and Suggestion for Rehearing En Banc which was denied on September 16, 1996.

REASONS FOR GRANTING THE WRIT

CAN THE COURT OF APPEALS ENTER A JUDGMENT OF CONVICTION UNDER AN "ANALOGOUS" FEDERAL STATUTE IN LIEU OF THE CONVICTION UNDER AN IMPROPERLY ASSIMILATED STATE STATUTE AT TRIAL, WHEN DOING SO IS NOT HARMLESS ERROR AND CAUSES SUBSTANTIAL PREJUDICE TO THE DEFENDANT'S RIGHTS?

In this case, the Court of Appeals for the Fifth Circuit agreed with the arguments of defense counsel that the government improperly assimilated the Louisiana first degree murder statute in its indictment and subsequent prosecution of petitioner. The Court of Appeals determined that the assimilation rendered the indictment defective but not "fatally flawed." The Court of Appeals reasoned that the Louisiana first degree murder statute was analogous to and most akin to the federal second degree murder statute and that both statutes shared the same common elements of proof. The Court of Appeals further held that there was no substantial prejudice to the defendant by the prosecution under the state statute because this placed the defendant on notice of the crime charged and the elements of proof. The Court of Appeals found that the imposition of a conviction and sentence under the analogous federal second degree murder statute did not substantially prejudice the defendant and that such a conviction was appropriate. The Court of Appeals then found it was unnecessary to reverse the original conviction and remand for new trial as the elements of proof had been met and that a conviction should be entered.

Petitioner disagrees with the analysis of the Court of Appeals. The Louisiana first degree murder statute, LSA-R.S. 14:30A(5) provides that:

> "A. First degree murder is the killing of a human being:
>
> (5) When the offender has the specific intent to kill or inflict great bodily harm upon a victim under the age of 12 or sixty-five hears of age or older."

The federal second degree murder statute, 18 U.S.C. § 1111(a) provides:

> "Murder is the unlawful killing of a human being with malice aforethought. Every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing; or committed in the perpetration of, or attempt to perpetrate, any arson, escape, murder, kidnapping, treason, espionage, sabotage, aggravated sexual abuse or sexual abuse, burglary, or robbery; or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed, is murdered in the first degree. Any other murder is murder in the second degree.

Fed. Rules of Cr. Proc. rule 7, 18 U.S.C.A., provides:

7(c)(3) Harmless Error:

> "Error in the citation or submission shall not be grounds for dismissal of the indictment or information or for reversal of the conviction if the error or omission did not mislead the defendants or the defendants were prejudiced."

Fed. Rules of Cr. Proc. rule 52(a), 18 U.S.C.A. provides:

> "Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded."

Defendant acknowledges that in some cases the imposition of sentence pursuant to an analogous federal statute in lieu of the improperly assimilated state statute would not cause substantial prejudice to the defendant. However, in this case, defendant urges that substantial prejudice did occur in a couple of respects. First, the Louisiana first degree murder statute requires as its elements of proof that the defendant have the specific intent to kill or the specific intent to inflict great bodily harm and the victim is a person under the age of 12 years. The prejudice claim of the defendant is not merely an academic or mechanical application of what the court considers to be the elements of proof required of the statute. The defendant contends that under the Louisiana statute, the jury could convict the defendant once the prosecution proved that the victim sustained great bodily harm and that the victim was under 12 years of age. Under the Louisiana statutory framework, second degree murder could not have been found because the additional element that the victim be under the age of 12 years did not exist.

A comparison of the federal and state statutes indicate that the state statute improperly expanded the criminal act much broader than did the federal statute. Furthermore, the federal first degree murder statute required a finding of premeditation whereas the first degree murder statute in Louisiana did not. Federal second degree murder did not require premeditation but required malice aforethought. The inquiry cannot stop by a finding that the provisions of the federal second degree murder statute which requires malice aforethought includes an intent to do seriously bodily injury which is analogous to the elements of proof of specific intent to inflict great bodily harm required by the Louisiana first degree murder statute.

Petitioner contends that it was the purpose of the government to charge her under the state first degree murder statute because it made its burden of proof easier. In that respect, the jury would be confronted with the situation in which a child under the age of 12 died from injuries received and that those injuries themselves would be indicative of an intent to do serious bodily injury. However, the focus on the requirements of specific intent are somewhat obscured. The trial testimony of Dr. Trant, the forensic pathologist for the government indicated that the blunt traumas to the head which caused brain swelling and death were not readily apparent through the scalp and hair. Any hemmorages under the skin or bruises would be invisible to the defendant. Therefore, the defendant would have no ability to suspect brain swelling and eventual death nor comprehend what grave bodily injury had occurred. (Tr. pp. 288)

The photographs introduced into evidence by the government and testified from by Dr. Trant indicated that there were numerous deep bruises to the skin which caused significant blood loss which contributed to death or could have been an independent cause of death. Dr. Trant testified under cross examination that, if the child had her clothes on, it might not be possible for the defendant to see the injuries that one would expect would cause great harm. (Tr. pp. 323) Furthermore, Dr. Trant testified that one would not know the seriousness of the problems with the child until the child became lethargic, began to develop an irregular heartbeat, her eyes rolled back in her head, and she stopped breathing. (Tr. pp. 333-334)

Clearly, the photographs and the requisite specific intent to inflict great bodily harm is at issue in this case. Prejudice to the defendant is the fact that using the state statute gave the government an easier burden of proof and a much more severe penalty.

Another area of prejudice to the defendant is the fact that she was convicted and sentenced under the Louisiana first degree murder statute and the Sentencing Guidelines for federal first degree murder. The probation officer considered the relevant sentencing guidelines for state first degree murder as being equivalent to federal first degree murder. As such, the guideline for federal first degree murder was used. The court found that the sentence was a mandatory term of life imprisonment.

On appeal, the Court of Appeals held that the analogous federal criminal statute was federal second degree murder. It then imposed a sentence of life imprisonment without considering the Sentencing Guidelines. The court reasoned it was unnecessary to remand for resentencing because the sentence imposed by the district court was within the statutory maximum provided under the federal second degree murder statute. This issue is addressed separately as it was clear error to fail to apply the mandatory sentencing guidelines.

Defendant contends that she was prejudiced by the assimilation of the state and first degree murder statute. To merely state on appeal that the court will recognize that the state statute was improperly assimilated and then affirm a conviction under the analogous federal murder statute and impose a new sentence pursuant to federal law and impose the same exact sentence does not diminish the prejudice. In fact, the purpose

of a reversal and remand for new trial is borne out by the improper result reached in this case.

The courts have found that reversal is necessary in cases where the fact that the defendant is being prosecuted for a crime which is not a crime under federal law. This court in Williams v. United States, 327 U.S. 711, 66 S.Ct. 778 (1946), held that the assimilative crimes act could not be used to make a state statute a federal offense when Congress already defined the crime under the federal code. Furthermore, the Williams court held that the assimilative crimes act could not assimilate a state crime in order to redefine or expand a federal statute. Like Williams, this case used the state statute to enlarge the federal statute and created a crime which Congress had not made a crime. Comparing the Louisiana first degree murder statute and the federal first degree murder statute, one recognizes that the government would have been unable to prove premeditation in order to convict the defendant under the federal first degree murder statute. Therefore, the government chose a state statute which created a greater penalty than that which was applicable under federal law. This is substantial prejudice to the petitioner and not harmless error. A reversal of the conviction should be granted and this matter remanded for new trial.

CAN THE COURT OF APPEALS REFUSE TO APPLY THE MANDATORY SENTENCING GUIDELINES TO DEFENDANT'S CONVICTION ON THE ANALOGOUS FEDERAL SECOND DEGREE MURDER STATUTE AND IMPOSE A SENTENCE ON THE DEFENDANT THAT EXCEEDS THE MAXIMUM SENTENCING GUIDELINE RANGE?

The Court of Appeals held that the flawed assimilation of the Louisiana first degree murder statute did not prejudice defendant or affect her substantial rights. The Court of Appeals determined that the evidence adduced at trial was sufficient to convict the defendant of the analogous federal criminal statute: second degree murder. The court reasoned that the two statutes shared similar elements of proof and that they were comparable.

Once the analogous federal conviction was decided upon, the Court of Appeals next considered what sentence to impose. It held "[r]esentencing is only required where the district court has imposed a sentence that exceeded the maximum sentence that the defendant would have received if sentenced under the applicable federal statute. " [Opinion, Court of Appeals, p. 16.]

The court further stated:

> "Here, the Lewises did not receive a sentence exceeding the maximum sentence allowed under the federal murder statute. The United States Code makes second degree murder punishable by imprisonment "for any term of years or for life." 18 U.S.C. § 1111 (emphasis added). Mr. and Mrs. Lewis both received life sentences. Unlike Hockenberry, the Lewises' sentences are supported by their joint indictment. Therefore, we need not remand for resentencing." [Opinion, Court of Appeals, p. 17.]

This holding is clearly erroneous. Petitioner was sentenced by the trial court to a term of life imprisonment which was mandatory under the Louisiana first degree murder statute, LSA-R.S. 14:30 C; which provides:

> "C. Whoever commits the crime of first degree murder shall be punished by death or life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence in accordance with the determination of the jury."

Defendant was sentenced to life imprisonment under the state law upon which she was convicted the Louisiana first degree murder statute and the analogous federal sentencing guideline for first degree murder: U.S.S.G. § 2A1.1.

The Court of Appeals relied on Hockenberry v. United States, 422 F.2d 171 (9th Cir. 1970) and United States v. Hall, 979 F.2d 320 (3rd Cir. 1992) for the proposition that remand for resentencing was unnecessary because the actual sentence imposed on petitioner was not more severe than the maximum term of imprisonment provided by the federal statute. Hockenberry held that a remand for resentencing was necessary because the term of imprisonment imposed under the assimilated state statute exceeded the maximum sentence allowed by the appropriate federal statute. Hall reached the opposite result: the sentence imposed under the improperly assimilated state statute was less than the maximum sentence allowed under the appropriate federal regulation; therefore, a remand for resentencing was unnecessary as Hall had not been prejudiced nor subjected to a more severe sentence.

The government never sought the death penalty in the instant case. The jury was instructed that the case did not involve the death penalty; therefore, the only sentence applicable upon conviction was life imprisonment. In fact, the Presentence Report used the Sentencing Guideline for federal first degree murder: U.S.S.G. § 2A1.1.

Petitioner has been subjected to a more severe sentence, and she has been prejudiced by it. Petitioner was sentenced to life imprisonment under the Louisiana first degree murder statute and the federal sentencing guidelines for federal first degree murder. The Court of Appeals held that the petitioner was guilty of federal second degree murder. The maximum sentence is "for any term of years or for life." 18 U.S.C.A. § 1111(a). However, the Sentencing Guidelines applicable to federal second degree murder, U.S.S.G. § 2A1.2, assigns a base offense level of 33 and a sentencing range of 135 - 168 months. Even if the base offense level were enhanced by 2 points for the vulnerability of the victim (a child), [U.S.S.G. § 3A1.1] the applicable sentencing range for a base level offense of 35 is 168 - 210 months.

How can the Court of Appeals hold that petitioner did not receive a sentence exceeding the maximum sentence allowed under the federal second degree murder statute? It cannot so hold. The sentencing guidelines are mandatory and must be applied to a defendant who is convicted of a federal offense. If the sentencing court departs from the guidelines, it must specifically articulate reasons for the departure. Further, 18 U.S.C.A. § 3553(b) provides:

> "[i]n determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission."

A sentence of life imprisonment exceeds the maximum sentence provided by U.S.S.G. § 2A1.2 of 210 months. See also U. S. v. Kelly, 1 F.3d 1137 (10th Cir. 1993). The proper remedy is to vacate the sentence imposed by the Court of Appeals and remand for resentencing.

In light of this clear error and prejudice to the petitioner, this court is urged to grant the writ of certiorari.

CONCLUSION

For the reasons stated herein, the petitioner urges this Court to grant the writ of certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, **FRANK GRANGER**, court appointed counsel for petitioner, **DEBRA FAYE LEWIS**, hereby certify that on this 16th day of December, 1996, one copy of the Petition for Writ of Certiorari and of the Motion for Leave to Proceed "In Forma Pauperis" in the above captioned matter was mailed, first class postage prepaid, to the following:

Josette Cassiere
Assistant United States Attorney
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Larry Regan
Assistant United States Attorney
611 Broad Street
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Rebecca Hudsmith
Federal Public Defender
102 Versailles Boulevard, Suite 816
Lafayette, Louisiana 70501

I further certify that all parties required to be served have been served.

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Attorney for petitioner

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 95-30860

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JAMES M. LEWIS;
DEBRA FAYE LEWIS,

Defendants-Appellants.

Appeal from the United States District Court
for the Western District of Louisiana

Before JOLLY, DUHÉ, and STEWART, Circuit Judges.

CARL E. STEWART, Circuit Judge:

James M. Lewis and Debra Faye Lewis appeal their convictions for first degree murder under Louisiana law pursuant to the Assimilative Crimes Act. Because the federal murder statute and sentencing guidelines occupy the area of the law, they contend that the district court erred in refusing to dismiss their indictments. They also challenge the sufficiency of the evidence as well as evidentiary rulings made by the district court. Additionally, Debra Lewis argues that Battered Women's Syndrome diminished her capacity to form a specific intent to kill or inflict great bodily harm or to aid and abet James Lewis. For the following reasons, we reverse the district court's ruling regarding the indictments but affirm the defendants' convictions and sentences.

FACTS

James Lewis and his wife, Debra Lewis, were arrested for the beating death of four-year-old Jadasha D. Lowery, the biological daughter of James Lewis and Stacy Lowery. The death occurred on the military reservation at Fort Polk in Vernon Parish, Louisiana, where Mr. Lewis was stationed with the United States Army.[1]

On the day of her death, Jadasha was subjected to severe beatings, which resulted in several contusions and bruises on her scalp and which caused massive bruising over her entire body. The body bruises caused hemorrhages beneath the skin that redirected one-third to two-thirds of her entire blood volume from her circulatory system and into the tissues surrounding the injuries. The head injuries caused Jadasha to suffer cerebral edema,[2] which was identified as the cause of her death. The indictment charged the Lewises with first degree murder under Louisiana law through

[1]Fort Polk, a United States military reservation, is a federal enclave as defined in 18 U.S.C. § 7.

[2]Cerebral edema is a condition in which the brain swells and presses on the brain stem and which eventually causes respiratory function to cease.

the Assimilative Crimes Act.[3] After receiving guilty verdicts, both Lewises were sentenced to life imprisonment. The Lewises appealed.

DISCUSSION

A. ASSIMILATIVE CRIMES ACT.

The Lewises argue that the indictment under which they were charged is defective because it improperly charges them under La. Rev. Stat. 14:30A(5) when 18 U.S.C. § 1111 criminalizes the same conduct. Mr. Lewis asserts that first degree murder of a person under the age of twelve under the Louisiana statute is comparable to second degree murder under section 1111, with the minor age of the victim causing punishment to be enhanced under the sentencing guidelines. Mrs. Lewis contends that the government was statute "shopping" when it charged them under Louisiana law in order to obtain a lesser standard of proof and the benefit of more severe penalties in the event the jury returned verdicts on lesser included offenses.

Our examination of the Lewises' indictment requires us to analyze the Assimilative Crimes Act. Interpretations of statutes receive de novo review. Estate of Moore v. C.I.R., 53 F.3d 712, 714

[3]The indictment provides as follows:

> That on or about the 20th day of December, 1993, at Fort Polk, Louisiana, in the Western District of Louisiana, upon lands acquired for the use of the United States and under the exclusive jurisdiction thereof, JAMES M. LEWIS and DEBRA FAYE LEWIS, defendants herein, each knowingly and willfully aided and abetted, one by the other, did, with specific intent to inflict great bodily harm, commit first degree murder of Jadasha D. Lowery, a human being under the age of twelve years, in violation of Title 14 Louisiana Revised Statutes Annotated, Section 30(5), [Amended March 6, 1996 to 30(A(5)], all in violation of Title 18, United States Code, Sections 7, 13, and 2. {18 U.S.C. §§ 7, 13, & 2; La. R.S. 14:30(5)}.

(5th Cir. 1995). Similarly, review of a district court's conclusion that an indictment is sufficient is reviewed under the de novo standard. United States v. Green, 964 F.2d 365, 372 (5th Cir. 1992), cert. denied, 506 U.S. 1055 (1993). After evaluating the language of the ACA, Supreme Court precedent, and other federal jurisprudence, we are compelled to conclude that the Lewises' indictment is invalid.

The ACA makes punishable crimes occurring on federal enclaves although Congress has not expressly addressed the conduct in the federal statutes. The ACA provides:

> Whoever within or upon any of the places now existing or hereafter reserved or acquired as provided in section 7 of this title, is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State . . . in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to like punishment.

18 U.S.C. § 13. Through the ACA the government may use state statutes to prosecute offenders on federal enclaves "only if no act of Congress directly makes the offender's conduct punishable." United States v. Brown, 608 F.2d 551, 553 (5th Cir. 1986). The ACA fills in gaps existing in federal statutes regarding criminal law. Id. However, where Congress has enacted legislation criminalizing conduct on the enclaves, the federal statutes preempt the state laws regarding those crimes. United States v. Sharpnack, 355 U.S. 286, 291 (1958).

The Supreme Court shed light on the limitations of the ACA in Williams v. United States, 327 U.S. 711 (1946). In Williams, the Court reversed the conviction of a white married man convicted under the Arizona statutory rape law pursuant to the ACA for having sex with a seventeen-year-old Indian girl on an Indian reservation. 327 U.S. at 725. The federal statutes punished carnal knowledge of a minor girl when the victim was under the age of sixteen, whereas the Arizona statute

punished the same conduct when the victim was under the age of eighteen. The Arizona statute provided a harsher penalty than the federal statute. Id. at 717. Interpreting the language existing in the ACA at the time, the Court concluded that the precise acts of the defendant were made criminal under federal statutes addressing adultery or fornication as well as carnal knowledge, and the government could not enlarge the definition of the federal carnal knowledge crime by incorporating the state statutory rape statute through the ACA. Id. at 717-18. The Court further noted that the ACA "has a natural place to fill through its supplementation of the Federal Criminal Code, without giving it the added effect of modifying or repealing existing provisions of the Federal Code." Id. at 718. The language of the ACA referred "in a generic sense" to "acts of a general type or kind." Id. at 722. The Court held that in Williams' case "not only has the generic act been covered by the [federal] definition of having carnal knowledge, but the specific acts have been made 'penal' by the [federal] definition of adultery." Id. at 723.

This court, like the majority of the other circuits,[4] has interpreted Williams as establishing a "precise acts" test regarding the applicability of the ACA. See United States v. Brown, 608 F.2d 551, 554 (5th Cir. 1979). In Brown, the court held that the government could prosecute the

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[4]The circuit split following Williams is well recognized. See, e.g., United States v. Broadnax, 688 F. Supp. 1080, 1081-82 (E.D. Va. 1988); and United States v. Smith, 614 F. Supp. 454, 460 (D. Me. 1985), vacated in part on other grounds, United States v. Mariea, 795 F.2d 1094 (1st Cir. 1986). The majority view holds that the ACA does not apply when the "precise act" prohibited by the state statute is defined and prohibited by the federal statute. See generally, United States v. Johnson, 967 F.2d 1431 (10th Cir. 1992), cert. denied, 506 U.S. 1082 (1993); United States v. Sasnett, 925 F.2d 392 (11th Cir. 1991); United States v. Griffith, 864 F.2d 421 (6th Cir. 1988), cert. denied, 490 U.S. 1111 (1989); United States v. Kaufman, 862 F.2d 236 (9th Cir. 1988); and Fields v. United States, 438 F.2d 205 (2d Cir.), cert. denied, 403 U.S. 907 (1971). Compare the minority view holding that the ACA does not apply when the federal statute punishes the "generic conduct" covered in the statute. United States v. Butler, 541 F.2d 730 (8th Cir. 1976).

defendant under the Texas child abuse statute even though injury to a child could be punishable under the federal assault statute because the precise act of injury to a child was not proscribed by federal law and the state statute was designed to punish specific conduct of a different character than the conduct proscribed by the federal assault statute. Mrs. Brown was charged with injuring her husband's biological two-year-old son, whom she struck on the head with a blunt, flat instrument. Though surgery revealed a subdural hematoma covering the left side of his brain, the child survived. The court in Brown rejected arguments that use of the child abuse statute enlarged the scope of the federal offense. It found the child abuse and assault statutes different because of the nature of the offense being punished. The court relied on the Second Circuit case, Fields v. United States, 438 F.2d 205 (2d Cir. 1971), to demonstrate that child abuse is a different type of assault than the conduct covered under the federal assault statute.

Similarly, in United States v. Fesler, 781 F.2d 384, 391 (5th Cir. 1986), the court clarified that the federal statute and the state statute must involve different elements and must seek to punish different conduct. In Fesler, the Feslers were charged with murder under the federal statute and causing serious bodily injury under the Texas child abuse statute for the scalding death of their ten-month-old daughter whom they deliberately dipped in scalding water. The defendants alleged that the indictment violated the ACA. The court held that because the statutes covered different "precise acts," no violation had occurred. Id. at 391 The court noted that death of a human being, essential for the manslaughter conviction, was unnecessary for the child abuse conviction. The court further explained that "[i]t is important that the state statute seeks to punish a particular offense at which the federal statute is not aimed, child abuse." Id. Accordingly, the court upheld application of the ACA in this context.

This court consistently has found that child abuse constitutes a different "precise act" which the government may charge in addition to murder under the federal statute. See United States v. Webb, 796 F.2d 60, 62 (5th Cir. 1986), cert. denied, 479 U.S. 1038 (1987) (convicted of second degree murder under the federal statute and injury to a child under the state statute for the death of a six-year-old boy whose head was slammed against a wall and who was scalded). Federal jurisprudence demonstrates that the different nature of the "act" regarding child abuse does not eliminate the need for seeking punishment for murder under the federal statute when the abuse results in death. See United States v. Phillip, 948 F.2d 241, 245 (6th Cir. 1991), cert. denied, 504 U.S. 930 (1992) (the defendant was charged with second degree murder under the federal statute and committing and permitting child abuse under the Kentucky child abuse statute); and United States v. Harris, 661 F.2d 138, 139 (10th Cir. 1981) (the defendant was charged with murder under the federal statute and the Wyoming child abuse statute). Indeed, where conviction under the state statute was allowed, the state child abuse statute was alleged in addition to murder under the federal statute, rather than in place of it.

Herein lies the distinction between the present case and Brown and Fesler. The government in the present case has entirely usurped the federal murder statute rather than supplemented the statute with "gap-filling" state law. The government uses the precise acts test as reasoned in Brown and Fesler to argue that it may use the state murder statute although the federal statute already punishes murder. We find that the precise acts test cannot save this indictment.

The "precise act" sought to be punished under 18 U.S.C. § 1111 and La. Rev. Stat. § 14:30A(5) for murder of a victim under twelve[5] is the intentional killing of a human being (i.e., "murder"). This is the conduct clearly identified in both statutes. Murder is punishable under both the state and federal statutes though they define and punish the conduct differently. Section 1111 provides the following definition of murder: "Murder is the unlawful killing of a human being with malice aforethought." The section then delineates the elements needed for first degree murder and second degree murder:

> Every murder perpetrated by [1] poison, [2] lying in wait, or [3] any other kind of willful, deliberate, malicious, and premeditated killing; or [4] committed in the perpetration of, or attempt to perpetrate, any arson, rape, burglary, or robbery; or [5] perpetrated from premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed, is murder in the first degree.
>
> Any other murder is murder in the second degree.

Section 14:30A(5)of the Louisiana Revised Statutes in pertinent part provides:

> A. First degree murder is the killing of a human being:
>
> . . . .
>
> (5) When the offender has specific intent to kill or to inflict great bodily harm upon a victim under the age of twelve or sixty-five years of age or older.

The varying definitions affect the degree of the crime and the level of punishment. "Murder of a child" does not constitute a different act of murder omitted from the federal murder statute. That Louisiana chose to define first degree murder regarding children differently than Congress defines it does not automatically make murdering a child a different or even a more specific act.

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[5]Hereinafter we refer to the crime of "murder of a victim under twelve" as "murder of a child" or "child murder."

The government attempts to show that the state's concern for child abuse prompted the specific reference to "victims under the age of twelve" in the first degree murder statute. We conclude that the government exaggerates the significance of the inclusion of the child murder provision in the Louisiana statute in order to piggyback the child abuse reasoning set forth in Brown and Fesler. The Louisiana legislature placed child murder in the first degree murder statute to deter crimes against these vulnerable members of society and to ensure that if a child is murdered the offender is guaranteed to receive a certain sentence.[6] This reasoning explains the placement of all acts listed in the Louisiana first degree murder provision as well as the reasoning underlying the enumerated crimes qualifying for first degree murder under the federal statute. The lists in both statutes define what raises a particular homicide to the grade of first degree murder under the respective systems. We reject the position taken by the government during oral argument that it used the Louisiana statute to "further define" the federal law. Further defining would create a more expansive definition of federal murder. Accordingly, to treat the murder of a child as conduct of a different nature would impermissibly enlarge the scope of the federal statute, which the Supreme Court in Williams instructed that we cannot do. We cannot permit the government to create the illusion of a "gap" in the law where none exists in order to enhance its ability to convict or to exact a harsher penalty.

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[6]Though not reflected in the murder statute, Congress addresses the vulnerability concern in the sentencing guidelines. Section 3A1.1 of the Federal Sentencing guidelines allows a judge to increase a defendant's sentence by two levels when the victim was a child. Section 3A1.1 provides: "If the defendant knew or should have known that a victim of the offense was unusually vulnerable due to age . . . or that the victim was otherwise particularly susceptible to the criminal conduct, increase by 2 levels."

Further, contrary to the government's suggestion, public concern regarding child abuse does not change the character of murder when a child is involved. The distinction we have recognized between assault under the federal statute and child abuse cannot transfer by analogy to create a tangible distinction between murdering an adult and murdering a child. Child abuse qualifies as a separate class of conduct because the nature of the crime spawns methods and treatments not needed in a general assault case. This is not necessarily true regarding the murder of a child. Children are murdered in many ways unrelated to child abuse. For example, if a child is shot during a robbery on a federal enclave, this conduct constitutes murder plain and simple, and this offense would not be different in nature so as to warrant invocation of the ACA. It would be illogical to say that child murders resulting from child abuse can be charged under the state statute pursuant to the ACA whereas all other child murders must be prosecuted under the federal statute. We find that the murder of a child is not a different degree of homicide that removes it from the federal murder statute.[7]

The government's interpretation of Brown and the precise acts test goes too far. Its interpretation would allow the wholesale incorporation of state law via the ACA. Neither Congress nor the Supreme Court intended such a result. For ACA purposes, a precise act cannot qualify as a "specific conduct of a different character" when the conduct is covered by a federal statute and when the acts described in the federal and state statutes differ only in name, definition, or

[7]Our decision might be different if the government were prosecuting the Lewises under a Louisiana murder statute that expressly made criminal child murders resulting from child abuse. This would make the precise act criminalized under the state statute qualify as being conduct of a different nature or character.

punishment.[8] The essential nature or theory of an act made criminal by a state statute must differ substantially from the federal statute in order to elevate the conduct to a precise act.

For example, "driving under the influence manslaughter" is conduct substantially different in nature than general "manslaughter." See United States v. Sasnett, 925 F.2d 392 (11th Cir. 1991). The theory underlying DUI manslaughter is to remove the need to prove that the drinking caused an accident. Id. at 396. The government need only prove that the defendant had a blood alcohol level of .10 or higher. The court in Sasnett allowed application of the ACA because no federal statute defined or prohibited this precise act. See also, United States v. Jones, 244 F. Supp. 181, 183 (S.D.N.Y. 1965) (allowing application of the ACA to prosecute using the "different theory" of disorderly conduct under the state statute rather than the federal parading/picketing statute where the defendants chained themselves to the court entrances to prevent entry or exit).

Murder of a child as defined under the Louisiana first degree murder statute cannot clear the "substantially different" hurdle. See Shirley v. United States, 554 F.2d 767, 768-69 (6th Cir. 1977)

[8]We note in passing that the Sixth Circuit persuasively has identified four categories of cases that arise under ACA cases: (1) all crimes criminal under the federal law are also criminal under state law, but additional conduct is criminal under state law, (2) federal law encompasses a broader area than the state law, but the state law carries harsher penalties or an easier burden of proof, (3) state and federal laws overlap to a degree, but each occupies an area of law not covered by the other, and the conduct at issue falls within the overlapped area, and (4) the laws overlap, as described in the third group; however, the conduct falls within the area in which the act is criminal under the state law but not the federal law. See United States v. Griffith, 864 F.2d 421, 423-24 (6th Cir. 1988). The district court in the present case found that this case falls within the third category because murder of a child could be punishable as federal murder, but the Louisiana statute presents a theory essentially different from that federal statute by taking into account the compelling state interest in protecting children under the age of twelve. We disagree. We find that this case falls within the second category. The Lewises' precise conduct is prohibited by the federal statute, but the penalty is harsher under the Louisiana statute. Murder of a child carries an automatic penalty of life or death in Louisiana. As explained above, the theories underlying the two statutes are not different.

(ACA inapplicable though armed robbery under the state statute was more specific and more harshly punished than the federal robbery statute); and United States v. Big Crow, 523 F.2d 955, 958 (8th Cir. 1975), cert. denied, 424 U.S. 920 (1976) (ACA inapplicable though the state statute prohibited assault resulting in great bodily harm and provided a stiffer penalty than the federal assault statute). Accordingly, we hold that the federal murder statute preempts the Louisiana first degree murder statute because the precise act here, killing a human being, is punishable under the federal statute and because the nature of the crime "murder of a child" does not differ substantially from the nature and theory of murder in general. The government improperly invoked the ACA to charge the Lewises under the Louisiana statute. The indictment contains an infirmity in that it references La. Rev. Stat. § 14:30A(5). We must determine whether the convictions and sentences can survive in spite of this infirmity.

B. REMEDY REGARDING FLAWED ASSIMILATION.

The infirmity discussed above is not fatal to the indictment in this case. We find the infirmity to be an apparent rather than a real defect. Accordingly, though we find error in the indictment, we will uphold the Lewises' convictions unless they establish reversible error on another ground. This court has previously adopted the maxim that "[w]here the government wrongfully secures a conviction under a state statute pursuant to the Assimilative Crimes Act, rather than under the relevant federal statute, the appropriate remedy is not reversal of the conviction, but rather a vacating of the sentence and a remand to the district court for resentencing[,]" provided that the basic elements of the crime as defined in the federal statute were proven at trial and provided that no trial errors warrant reversal of the convictions. See United States v. Olvera, 488 F.2d 607, 608 (5th Cir. 1973), cert. denied, 416 U.S. 917 (1974) (citing United States v. Chaussee, 536 F.2d 637,

644 (7th Cir. 1976) (citing United States v. Word, 519 F.2d 612, 618 (8th Cir. 1975)). Compare United States v. Butler, 541 F.2d 730, 737 (8th Cir. 1976) (the court discussed the applicable remedy of remanding for sentencing, but instead vacated the convictions because the government did not prove at trial the interstate commerce nexus, which was not an element of the state crime).[9]

In Olvera, the government conceded on appeal that the federal statute was controlling rather than the ACA and the Texas statute. 488 F.2d at 608. This court held that the "sentence must be vacated and the cause remanded for entry of a new judgment imposing sentence under the federal statute." The Ninth Circuit took a similar position in Hockenberry v. United States, 422 F.2d 171, 174 (9th Cir. 1970). In Hockenberry, although the government conceded that the existence of an applicable act of Congress precluded assimilation of the California statute through the ACA, the court refused to dismiss the indictment. The indictment stated a crime against the United States even though the language of the California statute differed from the applicable federal statute. 422 F.2d at 173-74. The court reasoned that rules 7(c) and 52(a) of the Federal Rules of Criminal Procedure instruct that

> "error in the citation of the statute or its omission shall not be ground for dismissal of the indictment * * * or for reversal of a conviction if the error or omission did not mislead the defendant to his prejudice" and . . . "any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."

Id. at 174 (internal brackets omitted). After noting that the defendant did not allege prejudice or defects affecting substantial rights and then finding that the record would not support either claim,

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[9]When discussing the conclusions reached in Chaussee, the district court below acknowledged the quote regarding remand. United States v. Lewis, 848 F. Supp. 692, 695 n.3 (W.D. La. 1995).

the court rejected the argument that the court lacked jurisdiction to prosecute the defendant. The Hockenberry court affirmed the defendant's conviction but remanded the case for resentencing.[10]

Likewise, we find that remand for reindictment and retrial is not required under the circumstances of this case. The basic elements are the same for second degree murder under 18 U.S.C. § 1111(a) and first degree murder under La. Rev. Stat. § 14:30A(5). Both statutes require proof of specific intent[11] and the killing of a human being. Regarding intent, 18 U.S.C. § 1111 requires proof of "specific intent to inflict serious bodily injury," and La. Rev. Stat. § 14:30A(5) requires proof of "specific intent to inflict great bodily harm." The dissimilar phrasing does not

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[10]"It is well settled [in the ACA context] that an incorrect statutory reference in an indictment does not require reversal where all of the essential elements of the correct statute are otherwise covered, but that any sentence imposed in excess of that allowed under the correct statute must be vacated and the case remanded for resentencing." United States v. Walker, 557 F.2d 741, 746-47 (10th Cir. 1977). Several circuits that have wrestled with defective indictments containing erroneously assimilated state law have reached the same conclusion. See, e.g., United States v. Hall, 979 F.2d 320, 323 (3d Cir. 1992); United States v. Lavender, 602 F.2d 639, 640-41 (4th Cir. 1979); United States v. Chaussee, 536 F.2d 637, 644-45 (7th Cir. 1976); United States v. Word, 519 F.2d 612, 618-19 (8th Cir.), cert. denied, 423 U.S. 934 (1975); United States v. Patmore, 475 F.2d 752, 753 (10th Cir. 1973); Dunaway v. United States, 170 F.2d 11, 12-13 (10th Cir. 1948).

[11]We reject Mrs. Lewis's arguments that the federal murder statute requires proof of "intent to kill." She says that because she and her husband never intended to kill Jadasha they could not be convicted of murder under the federal statute. This circuit has indicated that malice aforethought may be inferred from circumstances which show a callous, wanton, or extremely indifferent disregard for human life. United States v. Chagra, 807 F.2d 398, 402 (5th Cir. 1986), cert. denied, 484 U.S. 832 (1987) (after rejecting the defendant's argument that the jury instruction, which did not demand proof of an intent to kill but only demanded proof of reckless acts causing the death of another, was error, the court noted that the instruction reflected the correct definition of malice); see also, Unites States v. Harrelson, 766 F.2d 186, 189 n.5 (5th Cir.), cert. denied, 474 U.S. 908 (1985); and United States v. McRae, 593 F.2d 700, 703 (5th Cir.), cert. denied, 444 U.S. 862 (1979). More importantly, this court has specifically found that malice aforethought is equivalent to an intent do serious bodily injury. Lara v. Parole Comm'n, 990 F.2d 839, 841 (5th Cir. 1993) (explaining the three distinct mental states encompassed in malice aforethought: "(1) intent to kill; (2) *intent to do serious bodily injury*; and (3) extreme recklessness and wanton disregard for human life" [emphasis added]).

destroy the compatibility existing between the statutes. This court has already acknowledged that the intent element under the federal murder statute is comparable to the intent required under the Louisiana murder statutes. See United States v. Tolliver, 61 F.3d 1189, 1221 (5th Cir. 1995), vacated on other grounds, Sterling v. United States, 116 S. Ct. 900 (1996). In Tolliver, when analyzing a sentencing issue, the court agreed with the district court that the Louisiana second degree statute, under which the defendants were convicted, was most akin to the federal crime of first degree murder.

> [T]he language of the guidelines instructs the court to compare the conduct, not the titles of the statutes cited. As pointed out by the district court, different states have different labels for the same crime,
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> > [t]herefore, depending upon which state murder statute is charged as the underlying offense of "premeditated murder or killing with specific intent," inconsistent sentences for identical illegal conduct would be imposed in different states if the base offense level was computed merely by looking at the "label" of such statute and having that label be determinative of the most analogous federal offense, rather than looking at the actual substance of the underlying state statute to determine the most analogous federal offense.

The Tolliver court concluded that the district court had correctly compared the substance of the underlying offense and correctly found that first degree murder was the most analogous federal offense. Though labeled somewhat differently, "intent to inflict serious bodily injury" and "intent to inflict great bodily harm" represent parallel intents for purposes of evaluating these murder statutes. Accordingly, the elements under the federal and Louisiana murder statutes are analogous enough for us to conclude that the two statutes share the same essential elements.

In the present case, the government proved the elements for federal murder at trial. The district judge instructed the jury as follows:

in order to convict either of the defendants of First Degree Murder, you must find:

1. That said defendant killed Jadasha D. Lowery on or about December 20, 1993; and

2. That said defendant acted with specific intent to kill or inflict great bodily harm.

. . .

The jury's finding that both Lewises were guilty of this crime indicates that the intent and death elements were satisfied. Accordingly, the elements for second degree murder, which mirror the elements contained in the jury charge, were proven below.

Provided that we find below that the Lewises' convictions are not reversible due to trial error, remand for resentencing is not warranted in this case. Resentencing is only required where the district court has imposed a sentence that exceeded the maximum sentence that the defendant would have received if sentenced under the applicable federal statute. In Hockenberry, the court explained that resentencing was necessary because the indictment could not support the ten-year sentence Hockenberry received. 422 F.2d at 174. Though the maximum sentence under the California statute was ten years, the maximum sentence available under the federal statute was only five years. Accordingly, the court instructed the district court on remand to reduce the sentence to comport with the federal penalty.

In United States v. Hall, 979 F.2d 320, 323 (3d Cir. 1992), the Third Circuit refused to remand for sentencing because "the sentence imposed on Hall was not higher than that which could have been convicted under the CFR." The CFR provided punishment consisting of a fine not exceeding $500, or six months imprisonment, or both, plus costs. The district court sentenced Hall to 45 days imprisonment and a fine of $300. The Hall court found no prejudice and no need for remand.

Here, the Lewises did not receive a sentence exceeding the maximum sentence allowed under the federal murder statute. The United States Code makes second degree murder punishable by imprisonment "for any term of years or *for life*." 18 U.S.C. § 1111 (emphasis added). Mr. and Mrs. Lewis both received life sentences. Unlike Hockenberry, the Lewises' sentences are supported by their joint indictment. Therefore, we need not remand for resentencing.

C. CLAIMS OF TRIAL ERRORS.

Our conclusions regarding the defective, but not fatal, indictment and the appropriate remedy for the flawed assimilation do not end the discussion. We still must determine whether the convictions can stand in the face of the other trial errors alleged by the defendants. After a thorough review of the record, we find no reason to reverse the Lewises' convictions. We will, however, discuss the Lewises' specific contentions of error below.

1. *Sufficiency of the Evidence.*

Both Lewises claim that there was insufficient evidence to prove that they had specific intent to kill or inflict great bodily harm on Jadasha. Mr. Lewis claims that there is overwhelming evidence suggesting that Mrs. Lewis had a plausible motive (i.e., jealousy) to harm Jadasha and that she delivered the murderous blows to Jadasha; whereas, the evidence merely places him on the premises on the day of the murder. Mr. Lewis lists several witnesses who testified as to Mrs. Lewis's jealousy and abuse of Jadasha. Only Mrs. Lewis and her two daughters testified that Mr. Lewis hit Jadasha. Not even they testified that he hit Jadasha on the head. Moreover, the pathologist testified that he had to dissect Jadasha's body to see the extent of the bruising, and that the visible marks cannot be characterized as "great bodily harm."

Similarly, Mrs. Lewis admits to disciplining Jadasha, but denies that the discipline resulted in significant injury. She points primarily to testimony of the pathologist in support of her insufficient evidence claim. He testified that (1) the hemorrhages and bruises on Jadasha's head would not have been visible through her scalp and hair, (2) the deep bruises evident on the pre-autopsy and autopsy photographs of Jadasha were not visible at the time she died and had to work their way to the surface of her skin, (3) the body bruises might not be visible if Jadasha was wearing clothes, (4) there was no evidence that the brain hematomas were directly related to the contusions found on Jadasha's scalp, and (5) the contusions and deep hemorrhages were caused by objects like an adult's hand; one would not expect a fly swatter or 3/8" diameter switch[12] to inflict these injuries. Mrs. Lewis also argues that none of the many witnesses called by the government or the defendants testified that they saw Mrs. Lewis strike Jadasha or use unusual or excessively cruel discipline measures on her. She further asserts that "even though [Jadasha] died, that is not in and of itself murder."

The standard for reviewing the sufficiency of the government's evidence is whether a reasonable trier of fact could have found that the evidence established the appellant's guilt beyond a reasonable doubt. United States v. Stedman, 69 F.3d 737, 739 (5th Cir. 1995); and United States v. Ruggiero, 56 F.3d 647, 654 (5th Cir.), cert. denied, 116 S. Ct. 486 (1995). We must review the evidence in the light favorable to the guilty verdict, that is, in the light most favorable to the government. See United States v. Tannehill, 49 F.3d 1049, 1054 (5th Cir.), cert. denied, 116 S. Ct.

[12]A "switch" is a light branch from a tree or bush used to discipline by striking.

167 (1995). Further, we must consider all reasonable inferences arising from the evidence in the light most favorable to the government. Id.

Under Revised Statute 14:30A(5), the government had to prove that the Lewises killed Jadasha with specific intent to kill or inflict great bodily harm upon a victim under the age of twelve. Further, the government had to satisfy its burden of proving that the Lewises were guilty beyond a reasonable doubt; proving only that the Lewises *could be guilty* is insufficient to satisfy this burden. United States v. Sacerio, 952 F.2d 860, 863 (5th Cir. 1992). Because Jadasha's age and death are undisputed, we proceed to the issue of the defendants' intent.

We find that the record fully supports the defendants' convictions. Their arguments ignore the vast amount of circumstantial evidence which was sufficient to allow a jury to infer that they were guilty of murdering Jadasha. In the defendants' statements given contemporaneously with the investigation into Jadasha's death both admitted to beating Jadasha numerous times within the twenty-four hours preceding her death. Mr. Lewis shook Jadasha several times and hit her with his hand or a fly swatter, while Mrs. Lewis hit her with a fly swatter, coat hanger, and switches. Further, because they spent the day together, the Lewises were aware of the beatings administered by the other that day. A military police officer testified that soon after learning that Jadasha was dead Mr. Lewis told the military police officers "I shouldn't have done it; I shouldn't have spanked her like that." Other military police officers testified that Mrs. Lewis made spontaneous statements that "she only had to whip [Jadasha] three times that day" and "she shouldn't have hit the child. If the child would be okay, then she would not punish her again." In addition, both related a version of an incident in which Mr. Lewis was beating Jadasha, she ran in her room or was instructed to go to her room, and then Mrs. Lewis called her from the room, wherein Mr. Lewis beat Jadasha again.

Further, during the ride to the correctional facility Mr. Lewis was overheard asking investigator McCormick how pleading guilty to a charge relating to homicide would affect his military career.

Testimony from a paramedic, emergency personnel, a pediatrician, and a forensic pathologist attested to outward signs that demonstrated the extent of Jadasha's injuries. Testimony indicates that flesh wounds on Jadasha "were still oozing blood" when she arrived in the emergency room. The paramedic describes a mark on Jadasha's forehead, a swollen lip, blood matted in her hair, blood on the top of her left ear, skin missing from her left ear, and marks on her body from a fly swatter or a coat hanger. The injuries on her body were consistent with an adult's open hand, a fly swatter, a hanger, and a curtain rod.

The pediatrician's testimony corroborated the testimony of the paramedic and emergency room personnel. Additionally, he said that Jadasha's abdomen was tense, indicating the possibility of abdominal trauma. The cartilage appeared to be fractured in Jadasha's left ear. Jadasha had suffered multiple repeated trauma to her body. Moreover, the pediatrician agreed that the injuries qualified as "great serious injuries."

Similarly, the forensic pathologist's description of the crime scene showed that the blood of the slaughter remained in the house. Several blood drops appeared all over the floor of the living room and on the floor of Jadasha's room. Blood was found on pieces of a curtain rod found crumpled in the Lewises' garbage can. Dried blood spots were visible on the sofa, on the window curtail, on the closet doors in the hallway, in the master bedroom closet, and on walls. One blood spot on the wall looked like a child's smeared hand print. Blood appeared on articles of clothing and blankets. In addition to the blood spots, the pathologist found several pieces of broken twigs in Jadasha's room, two unusually thick and bulky fly swatters, which he said "didn't look like what you

would think a fly swatter would look like." He also found a clump of hair that appeared to be pulled out of the scalp.

The forensic pathologist counted over two hundred injuries on Jadasha's body caused by non-accidental injury. He matched the shape of Jadasha's injuries with the weapons the Lewises admitted using to beat Jadasha. He also testified regarding the nature of the old and new wounds covering her body. In great detail he described the raw sores, lacerations, and callouses evident on both sides of Jadasha's buttocks, which were caused from chronic, repetitive injuries. The pathologist testified that (with the exception of some areas on the buttocks, the left ear, and scars from a hot liquid burn) the injuries to Jadasha's body were inflicted within twenty-four hours of her death because there was "recent bleeding in the underlying tissue." So much blood was redirected into the tissues underlying the injuries that Jadasha's circulatory system was missing one-third to two-third of the blood normally found in the circulatory system. The pathologist explained that an adult's hand, rather than the twigs, coat hanger, or fly swatter, probably caused the deeper hemorrhages. He said the massive hemorrhaging could have eventually caused Jadasha's death; however, he said Jadasha died from cerebral edema (brain swelling), caused by a blow to her head. The pathologist conservatively counted nine head injuries, any one of which was sufficient to cause Jadasha's death. He said that the amount of force necessary to cause the brain to swell is equivalent to dropping a child on its head from a height higher than three feet onto an uncarpeted floor. Further, the pathologist discussed contusions on Jadasha's forehead, on both cheeks, and over the bridge on her nose as well as scratches and cuts in her face. He also said that several coat hanger type abrasions appeared in Jadasha's face.

Neighbors and friends of the Lewises also attested to the history of abuse to which Jadasha was subjected, primarily by Mrs. Lewis. For example, Amber Nantz, who visited the Lewises testified that she observed injuries on Jadasha on several occasions. When Mrs. Lewis explained in Jadasha's presence how a large black eye occurred, "Jadasha kind of had a funny expression on her fac[e], a funny look on her face that she didn't know what Debra was talking about." Mrs. Nantz also related that Mrs. Lewis withheld food from Jadasha for three days to teach her a lesson, and during that time she would intentionally eat food in front of Jadasha to see if Jadasha would admit to her hunger. Numerous other witnesses corroborated the signs of injury and abuse inflicted on Jadasha. Another person witnessed Jadasha with a black eye. Several attested to seeing the burn on Jadasha's ear and hearing of the three days of starvation. Most indicated that Debra voluntarily spoke of disciplining Jadasha, and they consistently indicated that the Lewises said they disciplined Jadasha by spanking her with their hands or a fly swatter. A few remembered Debra stating that "if she didn't stop whipping Jadasha she would hurt her or kill her" and "she was going to let James whip [Jadasha because] [s]he wasn't going to go to jail for killing that child." One witness testified that when Mrs. Lewis discussed beating Jadasha, her demeanor demonstrated that Mrs. Lewis thought the disciplining was funny. She also said Mrs. Lewis told her Jadasha had sores on her when she came to live with the Lewises and it therefore was necessary to bathe her in bleach. Another witness testified that she saw Mrs. Lewis strike Jadasha and burst her lip. At least one witness reported the starvation incident to the sergeant, and a few suggested to the Lewises that they needed counseling.

After viewing the evidence in favor of the government, we find the record abundant with evidence to prove that the Lewises had specific intent to inflict great bodily harm upon Jadasha and

that they aided and abetted each other in the beatings. There was sufficient evidence regarding the events of the day for the jury to conclude that the Lewises were aware that the other was beating Jadasha and that they assisted each other in some capacity in the beatings. Mr. and Mrs. Lewis both beat Jadasha repeatedly throughout the day of her death. There is no testimony that any other person contributed to the beatings Jadasha endured the day of her death. Without question because of the force accompanying their blows and the numerous beatings administered with that amount of force, the Lewises intended to cause Jadasha serious bodily harm.

The Lewises claim that they could not have known the effect of their blows because the deep bruises did not surface until later. They also say that they could not have seen the bruises through her clothes. We find this reasoning implausible and disingenuous. First, there was blood visible on Jadasha, her clothes, the walls, floors, window curtain, and the instruments used to beat Jadasha. Some of Jadasha's injuries still oozed blood when she reached the emergency room. The jury could infer that a blow from an adult to a forty-two pound four-year-old with enough force to draw blood capable of leaving the trail described above comes with specific intent to inflict great bodily harm.

Second, Jadasha had several old injuries on her body, especially on the cheeks of her buttocks. The Lewises had proof that the force of their blows would produce injury to Jadasha. This proof did not deter their beatings; instead, they administered many more blows of equal or greater force. We find that the Lewises did not have to see the recently created bruises to know that their blows were in fact causing serious internal injuries. Further, testimony revealed that the body blows would have caused Jadasha's death if the head injuries had not killed her. The jury could conclude that non-accidental blows of this quantity and intensity on a forty-two pound four-year-old from an

adult could only come with the specific intent to inflict serious bodily harm on the child.[13] Likewise, the jury could find that blows from an adult to the abdomen of a child of this age and size came with like intent.

Finally, the Lewises struck Jadasha on the head and caused her brain to swell. Testimony from the pathologist clarified the significance of this type of head injury. The jury reasonably could deduce that a non-accidental blow to a four-year-old's head with force greater than a three-foot fall can only come with specific intent to cause serious bodily harm.

We conclude that there was more than enough evidence for a jury to find beyond a reasonable doubt that Mr. and Mrs. Lewis possessed specific intent to inflict great bodily harm on Jadasha. We reject the Lewises' arguments that the evidence was insufficient; the evidence here allows more than an inference that the defendants beat Jadasha mercilessly and repeatedly throughout the day on her head and body, using far more force that would be acceptable to discipline a four-year-old child. Thus, the Lewises' convictions for first degree murder under Louisiana law could not be reversed on this ground.

2. ***Admissibility of the Photographs.***

The Lewises argue that the prejudicial effect of the photographs outweighed their probative value. Additionally, Mr. Lewis asserts that the autopsy photos, which were unusually gruesome and inflammatory, were unfair because the dissections depicted the extent of the bruising, which he could not have known prior to the autopsy.

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[13]We are convinced that the Lewises would not have sought medical treatment and would have treated the body bruises themselves with bleach and peroxide as they had treated Jadasha's injuries in the past.

We review the admissibility of photographic evidence for abuse of discretion. United States v. Follin, 979 F.2d 369, 375 (5th Cir. 1992). We find that the district court properly weighed the probative value against the prejudicial effect when evaluating the admissibility of the photographs. See Fed. R. Evid. 403. The court found the photos relevant to the issue of the defendants' intent and the issue regarding absence of accident. We agree that the photos are relevant for these reasons. Gruesome photographs are relevant when they establish an element of the crime charged. United States v. Bowers, 660 F.2d 527 (5th Cir. Unit B Sept. 1981); United States v. McRae, 593 F.2d 700, 707 (5th Cir.), cert. denied, 444 U.S. 862 (1979); and United States v. Kaiser, 545 F.2d 467, 476 (5th Cir. 1977). We also agree with the government that under the facts of this case the photos were relevant to counter claims that the Lewises' employed normal disciplinary measures. The extensive bruising divulges the excessive force behind the Lewises' supposedly disciplinary blows. The photos are the best means of conveying to the jury the force behind the blows.

Further, we find that the potential prejudice was consciously minimized here. The district court avoided duplication and limited the prejudicial effect of the photos by requiring the government to reduce the number of photos to be shown to the jury. Of the approximately 130 photos, the government entered only 16 into evidence. In another child abuse case resulting in death, we commented that the photos of the child's lacerated heart

> had the potential to inflame the jury, but we consider it no more inflammatory than photographs that portray this sort of death suffered by the victim in this or any other case where the circumstances of the death are at issue. United States v. Kaiser, 545 F.2d 467, 476 (5th Cir. 1977). The photograph, here, was essential to the government's case if it was to meet its burden of showing that appellant brought cruel and excessive physical force to bear on her child.

Bowers, 660 F.2d at 529. Thus, the district court acted well within its discretion when allowing the government to present the photos to the jury.

3. ***Admissibility of the Lewises' Statements.***

The Lewises argue that the district court erred by overruling their objections to the adequacy of the advice of rights given to them when they gave statements to investigators. Mr. Lewis asserts that he was not informed that he had a right to a private attorney. Mrs. Lewis claims that she was not advised of her rights until six hours after her initial detention at the hospital, that because of her emotional state she could not comprehend the severity of the situation, that the length of time to give the statement demonstrates the presence of coercion, that she believed the statement had to be given before she could she her son and Jadasha's body, and that she failed to understand the warnings given.

The Supreme Court in United States v. Miranda, 384 U.S. 436, 479 (1966) established the warnings that a defendant must receive in order for his statement to be admissible at trial. The defendant is free to waive the rights conveyed in the warnings if the waiver is done (1) voluntarily and (2) knowingly and intelligently. United States v. Andrews, 22 F.3d 1328, 1337 (5th Cir.), cert. denied, 115 S. Ct. 346 (1994).

In the present case, the district court held a suppression hearing wherein he heard live testimony from investigators and Mrs. Lewis regarding the warnings given to the defendants. The testimony indicates that the Lewises each received a form containing the customary Miranda warnings. The district court found that the military form given to Mr. Lewis adequately apprised him of his rights and allowed him to knowingly waive his rights. Mrs. Lewis received the FBI Miranda warnings form, which she initialed. Additionally, the district court questioned Mrs. Lewis

regarding her statements.[14] The court concluded that Mrs. Lewis understood that she was waiving her rights and voluntarily waived the rights after being adequately advised by an investigator. The district court admitted the statements into evidence after making these determinations.

The district court saw the live testimony and was in a position to factor body language into its credibility determinations. Accordingly, with the exception of the voluntary issue, we must accept the district court's factual findings regarding the interrogations unless the findings are clearly erroneous. United States v. Foy, 28 F.3d 464, 474 (5th Cir.), cert. denied, 115 S. Ct. 610 (1994). We cannot say that these findings are clearly erroneous based upon the record before us.

The issue of voluntariness is a legal question subject to de novo review. Andrews, 22 F.3d at 1340 n.12. A waiver is voluntary when it is "the product of a free and deliberate choice rather than intimidation, coercion, or deception." Id. at 1337. Nothing in the record demonstrates that the Lewises waived their rights because of intimidation, coercion, or deception. We cannot say that the district court erred in denying the Lewises' motions to suppress their statements.

4. ***The Battered Woman's Syndrome Defense.***

Mrs. Lewis argues that she suffered from Battered Women's Syndrome which diminished her capacity to develop specific intent to kill of inflict great bodily harm on Jadasha or to aid and abet Mr. Lewis to do the same. We concluded above that the government presented sufficient evidence to allow the jury to find that Mrs. Lewis had specific intent to inflict great bodily harm on

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[14]Mrs. Lewis actually gave two statements. Mrs. Lewis asked to give a second statement so that she could correct inaccurate statements made in the first statement.

Jadasha. The jury heard and evaluated the testimony regarding Battered Women's Syndrome. The jury chose not to believe that the Syndrome affected her ability to develop the intent necessary to commit murder. We find no basis in the record to disturb the jury's credibility choices. See United States v. Garcia, 86 F.3d 394, 398 (5th Cir. 1996) (noting that the appellate court must accept the credibility choices supporting the verdict); and United States v. Straach, 987 F.2d 232, 237 (5th Cir. 1993) (noting that the appellate court cannot weigh and assess the credibility of the witnesses).

Based on our evaluations of the record, we find no merit to any of the Lewises' evidentiary claims of error. Therefore, we will not compel the government to waste time and resources reindicting the Lewises, duplicating the trial, presenting the same sufficient evidence, and proving the same elements where the jury has already spoken loudly, clearly, and correctly. The jury found the Lewises guilty and, under the circumstances of this case, a new trial would not change this.

CONCLUSION

For the foregoing reasons, we AFFIRM the convictions and sentences of James M. Lewis and Debra Faye Lewis for murder of Jadasha D. Lowery even though the indictment erroneously charged them with first degree murder under La. Rev. Stat. § 14:30A(5) pursuant to the Assimilative Crimes Act rather than 18 U.S.C. § 1111.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 95-30860

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

DEBRA FAYE [redacted]

Defendant - Appellant

Appeal from the United States District Court for the Western District of Louisiana, Lake Charles

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion , 5 Cir., , F.3d)

(September 16, 1996)

Before JOLLY, DUHE' and STEWART, Circuit Judges.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FRAP and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor, (FRAP and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

United States Circuit Judge

CLERK'S NOTE:

SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

APPENDIX C

UNITED STATES DISTRICT COURT
Western District of Louisiana

UNITED STATES OF AMERICA

v. Case Number CR 94-20001-02

DEBRA FAYE LEWIS
Defendant.

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

The defendant, DEBRA FAYE LEWIS, was represented by Frank Granger.

The defendant was found guilty on count(s) I of a one count indictment after a plea of not guilty. Accordingly, the defendant is adjudged guilty of such count(s), involving the following offense(s):

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18 USC 7,13 &2 LA. R.S. 14:30(A)(5)	First Degree Murder	12/20/93	I

As pronounced on August 22, 1995, the defendant is sentenced as provided in pages 2 through 4 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the United States a special assessment of $ 50.00, for count(s) I, which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Signed this the 22nd day of August, 1995.

James T. Trimble
United States District Judge

Defendant's SSAN: 470-84-6936
Defendant's Date of Birth: 02/07/61
Defendant's address: 1400 East Ninth Avenue; Florala, AL

JUDGEMENT ENTERED August 23, 1995
BY _____
COPY TO Frank Granger
Financial
USA (collections)

(122)

COPY SENT
DATE 8.22.95
BY LB
TO: USM-AC3
USM SP 1
USP. 3
BoP 1
Sent Rep 1
Gen. Unit 1

Defendant: DEBRA FAYE LEWIS
Case Number: CR 94-20001-02

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of the defendant's life.
The defendant is to be given credit for time served.

The court recommends that the defendant be incarcerated at a facility that satisfies the Bureau of Prison's security recommendations, nearest to Pensacola, Florida.

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this Judgment as follows:

_____
_____
_____
_____

Defendant delivered on _____ to _____
at _____, with a certified copy of this Judgment.

_____
United States Marshal

By _____
Deputy Marshal

Defendant: DEBRA FAYE LEWIS
Case Number: CR 94-20001-02

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of

5 years.

While on supervised release, the defendant shall not commit another federal, state, or local crime; shall not illegally possess a controlled substance; shall comply with the standard conditions that have been adopted by this court (set forth below); and shall comply with the following additional conditions:

1. Report in person to the probation office as directed.

2. The defendant shall not own or possess a firearm, destructive device, or illegal substance.

3. The defendant shall participate in substance abuse and/or mental health counseling/treatment as directed by the U.S. Probation to include urinalysis, at the defendant's cost.

4. The defendant shall maintain employment and shall perform a minimum of 200 hours of community service during the first 24 hours of supervised release. While not employed, the defendant shall perform 40 hours of community service per week as directed by Probation.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this Judgment:

1) The defendant shall not leave the judicial district without the permission of the court or probation officer.
2) The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month.
3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.
4) The defendant shall support his or her dependents and meet other family responsibilities.
5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.
6) The defendant shall notify the probation officer within seventy-two hours of any change in residence or employment.
7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute or administer any narcotic or other controlled substance, or any paraphernalia related to such substances.
8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.
9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.
10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.
11) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.
12) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.
13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

Defendant: DEBRA FAYE LEWIS
Case Number: CR 94-20001-02

STATEMENT OF REASONS

The court adopts the factual findings and guideline application in the presentence report except as noted in the attached Memoradum Ruling.

Guideline Range Determined by the Court:

Total Offense Level:	45
Criminal History Category:	I
Imprisonment Range:	life
Supervised Release Range:	3 to 5 years
Fine Range:	$ 25,000 to $ 1,000,000
Restitution:	$ n/a

The fine is waived or is below the guideline range because of the defendant's inabilty to pay.

The sentence is within the guideline range, that range exceeds 24 months, and the sentence imposed for the following reasons: Severity of offense.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

LAKE CHARLES DIVISION

UNITED STATES OF AMERICA	:	**DOCKET NO. 94-20002-02**
	:	
VS.	:	**JUDGE TRIMBLE**
DEBRA FAYE LEWIS	:	**MAGISTRATE JUDGE WILSON**

MEMORANDUM RULING

Presently before the court are the defendant's, Debra Faye Lewis's, objections to the presentence report which was prepared by the Probation Department.

In the first, second, and fourth objections the defendant objects to certain factual information which was contained in the presentence report, particularly the categorization of trial testimony. This court presided over the trial of this defendant and is very familiar with the testimony brought forth. The Presentence Report ("PSR") generally bears sufficient indicia of reliability to be considered as evidence by the court in resolving factual disputes. *U.S. v. Valencia*, 44 F.3d 269 (5th Cir.(La.) Jan 26, 1995)(No. 94-40063). It is proper for the district court to rely upon the PSR's construction of evidence to resolve a factual dispute, rather than relying on the defendant's version of the facts. *U.S. v. Montoya-Ortiz*, 7 F.3d 1171 (5th Cir.(Tex.) Nov.12, 1993)(No. 92-8204), citing *U.S. v. Robins*, 978 F.2d 881, 889 (5th Cir. (Tex.) Nov. 20, 1992)(No. 91-1850). Thus, the court, based upon its own recollection as well as the facts recited in the PSR, specifically adopts the facts as stated therein.

The third objection concerns the assignment of two additional points for a vulnerable victim. The defendant argues that such a victim related adjustment, U.S.S.G. §3A1.1, is inappropriate because the Louisiana statute under which the defendants were charged required the victim to be under 12 years of age. The defendant is correct that a condition that occurs as a necessary prerequisite to the commission of a crime cannot constitute an enhancing factor under the "vulnerable victim" enhancement provision of the sentencing guidelines; the vulnerability of that provision must be "unusual" vulnerability which is present only in some victims of that type of crime. *U.S. v. Moree*, 897 F.2d 1329 (5th Cir. (Miss.) March 29, 1990)(No. 89-4204); U.S.S.G. § 3A1.1; *U.S. v. Rowe*, 999 F.2d 14 (1st Cir. (Mass.) Jul 22, 1993)(No. 92-1959)(must show individual circumstances); *U.S. v. Morrill*, 984 F.2d 1136 (11th Cir. (Ga.) Feb 16, 1993)(No. 91-8386)(victim must possess unique characteristics which make him or her more vulnerable or susceptible); *U.S. v. Davis*, 967 F.2d 516 (11th Cir. (Ala.) Aug 3, 1992)(No. 90-7108) (circumstance, as well as immutable characteristics, can render a victim unusually vulnerable). In *U.S. v. Peters*, 962 F.2d 1410, 1417 (9th Cir. (Cal.) Feb 7, 1992)(No. 91-50097, 91-50133), the court held that "vulnerability" includes not just age, but other characteristic of the victim, including the victim's reaction to the criminal conduct and the circumstances surrounding the act.

In the case at bar, to be prosecuted under the Louisiana state law, the victim had to be under age twelve. The vulnerability component of the Sentencing Guideline, however, incorporates more than mere age. This court agrees with Probation that the victim in this case was certainly vulnerable. The facts of the case show that the victim was left in the control of a step-mother who obviously was not fond of the little girl. Because the victim's father was in the military, the child was removed from other family members who may have noticed the signs of abuse, particularly the grandmother who was particularly close to the little girl. The pattern of abuse was repeated and the child had no way of escape. She was trapped in a situation with two people who she should have been able to trust, yet who systematic beat her to death. The defendant's own statement, although not produced in its

entirety for the jury, indicated that she called the child out of her room repeatedly the night of her death so that her father could beat her. If any victim is "vulnerable" it was the four year old victim in this case. The defendant's objection is OVERRULED.

Lake Charles, Louisiana, this 22nd day of August, 1995.

JAMES T. TRIMBLE, JR.
UNITED STATES DISTRICT COURT

COPY SENT
DATE 8-22-95
BY LB
TO: Attached to Judgment

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

AUGUST 22, 1995
Date

PRESENT: JAMES T. TRIMBLE, JR., Judge Presiding
JOE WILLIAMS, Court Reporter
JO ANN BENOIT, Minute Clerk
COURT OPENED: 10:00 A.M. COURT ADJOURNED: 10:30 A.M.

MINUTES OF COURT

CASE NO. CR94-20001-02
DEFENDANT: DEBRA FAYE LEWIS
GOVT.COUNSEL: MICHAEL SKINNER AND LARRY J. REGAN
DEFENSE COUNSEL: FRANK GRANGER

COPY SENT
DATE 8-22-95
BY LB
TO: Skinner
Regan
Granger
Hudson

X Case is called for sentencing.
Objections to the presentence report are ruled on by Written Memorandum Ruling.
In determining the particular sentence to be imposed, the court has considered the factors contained in 18 U.S.C. 3553.
Pursuant to the sentencing Reform Act of 1984, it is the judgment of the court that the defendant, DEBRA FAYE LEWIS, is hereby committed to the custody of the Bureau of Prisons to be imprisoned for life on count I of the indictment. The defendant is to be given credit for time served.
Upon release from imprisonment, the defendant shall be placed on supervised release for a term of five (5) years. While on supervised release, the defendant shall not commit another federal, state or local crime; shall not illegally possess a controlled substance; shall comply with the standard conditions that have been adopted by this court and shall comply with the following additional conditions:

1) Report in person to the probation office as directed.
2) Shall not possess a firearm, destructive device, or illegal substance.
3) Shall participate in substance abuse treatment and /or mental health counseling/treatment as directed by the U.S. Probation Office to include urinalysis, at the defendant's cost.
4) Shall maintain employment and shall perform a minimum of 200 hours of community service during the first 24 months of supervised release. While not employed, the defendant shall perform forty hours of community service per week as directed by Probation.

Upon beginning supervised release, the Probation Department shall supply the defendant with a written statement that sets forth the conditions to which the term of supervised release is subject, and that is sufficiently clear and specific to serve as a guide for the defendant's conduct and for such supervision as is required.
The court finds that the defendant does not have the ability to pay a fine.
The defendant is to pay the standard assessment of $50.00 on count I to the Crime Victim Fund immediately.
The defendant is advised by the court of her right to appeal. The defendant is remanded to the custody of the U.S.Marshal to begin service of this sentence. The court recommends incarceration at a facility that meets the Bureau of Prison's security requirements that is nearest to Pensacola, Florida.

Nos. 96-7151 and 96-7726

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

DEBRA FAYE LEWIS, PETITIONER

v.

UNITED STATES OF AMERICA

JAMES M. LEWIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WALTER DELLINGER
Acting Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

DEMETRA LAMBROS
Attorney

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

23 pp

QUESTION PRESENTED

Whether petitioners were properly charged, convicted, and sentenced for the murder of their four-year old daughter under the Assimilative Crimes Act, 18 U.S.C. 13, and the Louisiana child murder statute, 14 La. Rev. Stat. Ann. § 30A(5).

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

No. 96-7151

DEBRA FAYE LEWIS, PETITIONER

v.

UNITED STATES OF AMERICA

No. 96-7726

JAMES M. LEWIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-28)[1] is reported at 92 F.3d 1371. The opinion of the district court denying petitioners' pretrial motions to dismiss the indictment is reported at 848 F. Supp. 692.

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[1] "Pet. App." refers to the appendix to the petition in No. 96-7151.

JURISDICTION

The judgment of the court of appeals was entered on August 19, 1996. Petitions for rehearing were denied on September 16, 1996 (Pet. App. B) and October 30, 1996 (96-7726 Pet. App. B). The petition for a writ of certiorari in No. 96-7151 was filed on December 16, 1996. The petition for a writ of certiorari in No. 96-7726 was filed on January 28, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Louisiana, petitioners James M. Lewis and Debra Faye Lewis were convicted of first degree murder of Jadasha D. Lowery, in violation of 14 La. Rev. Stat. Ann. § 30A(5), and pursuant to the Assimilative Crimes Act, 18 U.S.C. 13, 7, and 2. Petitioners were sentenced to life imprisonment. The court of appeals affirmed the convictions and sentences. Pet. App. 1-28.

1. Jadasha Lowery was the four-year-old daughter of petitioner James Lewis. Petitioner Debra Lewis was her stepmother. Her death occurred in the family's home at Fort Polk, a United States military reservation, where petitioner James Lewis was stationed with the U.S. Army. Pet. App. 2.

Jadasha was killed at the hands of petitioners on December 20, 1993, as the result of repeated and severe beatings. The forensic pathologist who examined Jadasha counted over two hundred injuries on her body. Jadasha received most of those injuries within 24 hours of her death, although raw sores, lacerations and callouses

on her body evidenced chronic and repetitive injuries. Pet. App. 2, 21.

Petitioners admitted that they had beaten Jadasha numerous times within the 24-hour period before her death. Petitioner James Lewis shook the little girl and beat her with his hand or a fly swatter. Petitioner Debra Lewis beat Jadasha with a fly swatter, hit her across the face with a coat hanger, and also used switches to whip the child. Because the three spent the day of Jadasha's death together, each petitioner was aware of the beatings administered by the other. Indeed, once during the day, the little girl ran into her room following a beating by James Lewis -- only to have Debra Lewis summon her again for another round of beatings by her father. Pet. App. 19.

Investigators at the crime scene found blood throughout the house: on the floor of the living room, on the floor in Jadasha's room, on the sofa, window curtain, closet doors in the hallway, master bedroom closet, on the walls, on clothing, on blankets. Blood was found on pieces of a curtain rod found crumpled in the Lewises' garbage can. One blood spot on the wall looked like a child's smeared hand print. Pet. App. 20.

The pathologist testified that Jadasha had died of a cerebral edema -- a swelling of the brain that ultimately causes respiratory functions to cease -- caused by a blow to the head. He conservatively counted nine head injuries, any one of which was sufficient to cause death. He testified that such a blow was the equivalent of dropping a child on her head from more than three

feet onto an uncarpeted floor. Pet. App. 2, 21. Jadasha also suffered massive hemorrhaging, losing one- to two-thirds of her entire blood volume from her circulatory system, which was redirected into the tissues underlying her injuries. The pathologist testified that the hemorrhaging could have eventually caused the girl's death if the head injuries had not killed her first. Id. at 21.

Neighbors and friends attested to a history of child abuse by petitioners. One had observed injuries on Jadasha on several occasions, including a large black eye and burst lip. Another told of how petitioner Debra Lewis withheld food from Jadasha for three days, and how she bathed the little girl in bleach. Others corroborated signs of injury and abuse, including a burn on Jadasha's ear caused by hot liquid. A few remembered hearing petitioner Debra Lewis state that "if she didn't stop whipping Jadasha she would hurt her or kill her," and that "she was going to let James whip [Jadasha because] [s]he wasn't going to go to jail for killing that child." Pet. App. 21-22.

2. The indictment charged petitioners with first degree murder under Louisiana law[2] pursuant to the Assimilative Crimes Act

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[2] The Louisiana first degree murder statute provides, in pertinent part:

> A. First Degree Murder is the killing of a human being:
> * * * * *
> (5) When the offender has the specific intent to kill or to inflict great bodily harm upon a victim under the age of twelve.

14 La. Rev. Stat. Ann. § 30A(5). The Louisiana statute provides for a mandatory sentence of life imprisonment if the government does not seek the death penalty. 14 La. Rev. Stat. Ann. § 30C.

(ACA or Act).[3] Before trial, petitioners filed motions to dismiss the indictment. They argued that the federal murder statute, 18 U.S.C. 1111, provides for the specific crime of first degree murder, and that the assimilation of the Louisiana murder statute under the Assimilative Crimes Act was therefore improper.[4] 96-7726 Pet. 3-4; Debra Lewis C.A. Record Excerpts ¶ 5.

The district court denied the motions, holding that petitioners were properly charged under the Louisiana statute, which classifies as first degree murder the killing of a victim

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[3] The Assimilative Crimes Act provides in pertinent part:

> (a) Whoever within or upon any of the places now existing or hereafter reserved or acquired as provided in section 7 of this title, is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.

18 U.S.C. 13. The Act applies within the "special maritime and territorial jurisdiction of the United States," as defined by 18 U.S.C. 7. That area includes, inter alia, "[a]ny lands reserved or acquired for the use of the United States * * * for the erection of a fort, magazine, arsenal, dockyard, or other needful building." 18 U.S.C. 7(4).

[4] The federal murder statute provides, in pertinent part:

> (a) Murder is the unlawful killing of a human being with malice aforethought. Every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing * * * is murder in the first degree.
> Any other murder is murder in the second degree.

18 U.S.C. 1111(a). Like the Assimilative Crimes Act, the federal murder statute applies "[w]ithin the special maritime and territorial jurisdiction of the United States." 18 U.S.C. 1111(b).

under the age of 12 when committed with specific intent to kill or to inflict great bodily harm. United States v. Lewis, 848 F. Supp. 692, 695 (W.D. La. 1994); see note 2, supra. The court concluded that although the federal murder statute encompasses all murders, the "precise act" prohibited under Louisiana law -- the murder of a child under 12 -- is not murder in the first degree under federal law. Ibid. The Louisiana statute, the court explained, aims specifically to deter child abuse, a purpose not addressed by its federal counterpart. Ibid.

3. Following their convictions, petitioners were sentenced to life imprisonment under the federal Sentencing Guidelines. Pet. App. C. They were each assigned a base offense level of 43, pursuant to the Guideline for first degree murder, § 2A1.1. Both were given two additional points under Guidelines § 3A1.1 (vulnerable victim), for a final offense level of 45. Both were placed in Criminal History Category I. The resulting Guidelines sentence for each petitioner was life imprisonment. Debra Lewis Presentence Report (PSR) at 14-15; James Lewis PSR at 14-15. The district court sentenced each petitioner to life imprisonment. Pet. App. 3.

4. The court of appeals affirmed petitioners' convictions and sentences. Pet. App. 1-28.

The court of appeals first held that petitioners should have been charged under the federal murder statute rather than the Louisiana murder statute and the Assimilative Crimes Act. The court asserted that the Assimilative Crimes Act "fills in gaps

existing in federal statutes regarding criminal law," but that "where Congress has enacted legislation criminalizing conduct on the enclaves, the federal statutes preempt the state laws regarding those crimes." Pet. App. 4. In the view of the court of appeals, no "gap" in federal law existed because the conduct at issue was proscribed by 18 U.S.C. 1111. Pet. App. 9. The court concluded that "the federal murder statute preempts the Louisiana first degree murder statute because the killing of a human being is punishable under the federal statute and because the nature of the crime 'murder of a child' does not differ substantially from the nature and theory of murder in general." Id. at 12.

The court held, however, that the government's reliance on the Assimilative Crimes Act did not require reversal of petitioners' convictions. The court explained that

> [t]he basic elements are the same for second degree murder under 18 U.S.C. § 1111(a) and first degree murder under La. Rev. Stat. § 14:30A(5). Both statutes require proof of specific intent and the killing of a human being. Regarding intent, 18 U.S.C. § 1111 requires proof of "specific intent to inflict serious bodily injury," and La. Rev. Stat. § 14:30A(5) requires proof of "specific intent to inflict great bodily harm." * * * Though labeled somewhat differently, "intent to inflict serious bodily injury" and "intent to inflict great bodily harm" represent parallel intents for purposes of evaluating these murder statutes.

Pet. App. 14-15 (footnote omitted). Based on the statutory elements of the state and federal crimes, and the instructions given to the jury at petitioners' trial, the court of appeals concluded that the elements of second degree murder under federal law had been proved by the government and found by the jury. Id. at 15-16.

The court of appeals also concluded that a remand for resentencing was not required. The court stated that "[r]esentencing is only required where the district court has imposed a sentence that exceeded the maximum sentence that the defendant would have received if sentenced under the applicable federal statute." Pet. App. 16. The court observed that petitioners "did not receive a sentence exceeding the maximum sentence allowed under the federal murder statute," because federal law provides that persons convicted of second degree murder may be imprisoned "for any term of years or for life." Id. at 17 (quoting 18 U.S.C. 1111(b)). The court concluded on that basis that it "need not remand for resentencing." Pet. App. 17.[5]

ARGUMENT

Petitioner Debra Lewis contends (96-7151 Pet. 9-14) that her conviction should be reversed and the case remanded for a new trial. Both petitioners argue that the court of appeals erred in affirming their sentences. 96-7151 Pet. 9, 14-18; 96-7726 Pet. 6-11. Those arguments are premised on the court of appeals' determination that petitioners should have been tried under the federal murder statute rather than the Assimilative Crimes Act and the Louisiana child murder statute. As we explain below, however, petitioners were properly charged, convicted, and sentenced under the Assimilative Crimes Act and the Louisiana child murder statute.

[5] The court of appeals also rejected petitioners' challenges to the sufficiency of the evidence and to the admission into evidence of certain photographs and of petitioners' own statements to investigators. Pet. App. 17-28. Petitioners do not press those challenges in this Court.

Thus, although we disagree with the court of appeals' reasoning on that point, the court's judgment affirming petitioners' convictions and sentences is correct. Further review is not warranted.[6]

1. The Assimilative Crimes Act "use[s] local statutes to fill in gaps in the Federal Criminal Code where no action of Congress has been taken to define the missing offenses," Williams v. United States, 327 U.S. 711, 719 (1946), by making the penal laws of a State applicable to crimes committed in federal enclaves. See United States v. Hall, 979 F.2d 320, 322 (3d Cir. 1992); United States v. Brown, 608 F.2d 551, 553 (5th Cir. 1979); see also United States v. Sharpnack, 355 U.S. 286, 293 (1958) ("within each federal enclave, to the extent that offenses are not pre-empted by congressional enactments, there shall be complete current conformity with the criminal laws of the respective States in which the enclaves are situated"). The Act applies to any "act or omission" occurring within a federal enclave "which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State * * * in which such place is situated." 18 U.S.C. 13(a).

This Court's most thorough discussion of the ACA was set forth in its decision in Williams. The defendant in that case was charged with having intercourse with a female between the ages of 16 and 18 in Indian country. He was convicted of statutory rape

[6] The prevailing party may defend a judgment before this Court on any ground properly raised below, whether relied upon, rejected, or even considered by the district court or court of appeals. See, e.g., Bennett v. Spear, No. 95-813 (March 19, 1997), slip op. 11.

under an Arizona statute that set the age of consent at 18. At the time of the prosecution and conviction, federal law defined the separate crimes of rape, assault with intent to commit rape, carnal knowledge of a girl less than 16 years old, adultery, and fornication. 327 U.S. at 713-714 & nn. 4-8. This Court agreed that the ACA applies to crimes committed in Indian country, id. at 713, but concluded that the state law setting the age of consent at 18 could not be assimilated under the ACA in light of Congress's decision to set the age of consent at 16. Id. at 717-718. As the Court explained, where "(1) the precise acts upon which the conviction depends have been made penal by the laws of Congress" and "(2) the offense known to [state law] has been defined and prohibited by the Federal Criminal Code," the federal offense cannot "be redefined and enlarged by application to it of the Assimilative Crimes Act." Id. at 717. "Because Congress intended to "cover rape and all related offenses fully" and "gave special attention to the age of consent," id. at 724, the Court held, the Arizona statutory rape law could not be applied to the federal enclave under the ACA.

The ACA is not rendered inapplicable simply because the primary conduct that is the subject of the prosecution might also violate some federal criminal law.[7] Rather, the ACA applies unless

[7] The courts of appeals have frequently sustained convictions for assimilated state crimes under the ACA, even where the defendant's conduct would also have been subject to prosecution under a federal criminal statute. See, e.g., United States v. Sasnett, 925 F.2d 392, 396 (11th Cir. 1991) ("precise act" of causing death while driving under the influence of alcohol was properly prosecuted under state law even though defendant's conduct

Congress has addressed the specific problem that is the subject of the state law sought to be assimilated, in a manner that conflicts with the policies reflected in the state enactment. Thus, in Williams, assimilation of the Arizona statutory rape offense would have frustrated Congress's decision to set the age of consent at 16. See 327 U.S. at 718 ("a conflicting State definition does not enlarge the scope of the offense defined by Congress").

No such conflict exists in this case. Louisiana has made the murder of a child -- either with specific intent to kill or to cause serious bodily injury -- a separate and distinct crime, punishable as first degree murder. 14 La. Rev. Stat. Ann. § 30A(5). The State has evidently determined that killing a child, whether deliberately or through intentional abuse, is a distinct offense warranting a distinct penalty. See Louisiana v. Weiland, 505 So.2d 702, 709 & n.31 (La. 1987) (passage of child murder statute reflects the view that "[c]hildren * * * are in the category of persons needing special protection"). The State's

was also covered by federal involuntary manslaughter statute; state law was "designed to punish specific conduct which is not specifically addressed by federal law"); United States v. Griffith, 864 F.2d 421, 423-424 (6th Cir. 1988) (ACA prosecutions may appropriately be brought for various forms of aggravated assault, even where conduct in question also violates federal assault statute), cert. denied, 490 U.S. 1111 (1989); United States v. Kaufman, 862 F.2d 236, 237-238 (9th Cir. 1988) (per curiam) (ACA prosecution was brought under an assimilated Oregon law that prohibited pointing a loaded or unloaded firearm at another; court held that the ACA charge was proper even though defendant might have been prosecuted under federal assault statute); Fields v. United States, 438 F.2d 205, 207 (2d Cir.), cert. denied, 403 U.S. 907 (1971) (assimilation of state malicious shooting statute was proper even though acts committed were criminal under federal assault statute; state statute "provides a theory essentially different from that provided in the federal statute").

decision is not in conflict with any federal enactment: Congress has not addressed the subject of child murder in a direct or specific manner.

The court of appeals decisions most closely on point have recognized that state laws prohibiting the abuse of children may properly be applied in federal enclaves under the Assimilative Crimes Act, even where the conduct at issue is also violative of a more general federal law. In United States v. Brown, the defendant was convicted under a Texas child abuse statute, pursuant to the ACA, for beatings inflicted upon her two-year-old stepson. She argued that the ACA was inapplicable because her alleged conduct was covered by the federal assault statute. 608 F.2d at 553. The court rejected that contention. It recognized that the defendant could have been charged under the federal statute -- which criminalized, inter alia, "assault by striking, beating, or wounding." Id. at 554 (quoting 18 U.S.C. 113(d)). It held, however, that assimilation of the state statute was proper because the "precise act" of injury to a child was not proscribed by federal law. Ibid. Child abuse, the court explained, is "specific conduct of a different character" than that criminalized by the federal assault statute. Ibid.

Similarly, in United States v. Fesler, 781 F.2d 384 (5th Cir.), cert. denied, 476 U.S. 1118 (1986), two parents convicted of federal involuntary manslaughter and state child abuse challenged their state law convictions under the Assimilative Crimes Act. They argued that their alleged conduct -- the fatal scalding of

their infant daughter -- could not be prosecuted under the Assimilative Crimes Act because it was also violative of the federal manslaughter statute. Id. at 390. The court rejected that claim, explaining that "the criminal acts charged are distinct" because, inter alia, "[t]he Texas penal code states that the victim must be under 14 years old or under before all the elements of child abuse are satisfied." Id. at 391. The court deemed it "important that the state statute seeks to punish a particular offense at which the federal [involuntary manslaughter] statute is not aimed, child abuse." Ibid. Similarly here, the relevant Louisiana Code provision is directed to an evil -- the murder of children -- that is not the subject of any distinct federal prohibition.

In explaining its contrary conclusion in this case, the court of appeals stated that the "different nature of the 'act' regarding child abuse does not eliminate the need for seeking punishment for murder under the federal statute when the abuse results in death." Pet. App. 7. In support of that proposition, the court cited United States v. Webb, 796 F.2d 60, 62 (5th Cir. 1986), cert. denied, 479 U.S. 1038 (1987), in which the defendant was charged both with federal murder and child abuse under Texas law; United States v. Phillip, 948 F.2d 241, 245 (6th Cir. 1991), cert. denied, 504 U.S. 930 (1992), in which defendants were charged under the federal murder statute as well as the Kentucky criminal abuse statute; and United States v. Harris, 661 F.2d 138, 139 (10th Cir. 1981), where the Wyoming child abuse statute was assimilated under

the ACA and charged in addition to federal murder. Pet. App. 7. The court's reliance on those decisions was misplaced. The question in this case is not whether petitioners' conduct could have been prosecuted under the federal murder statute. Such a prosecution would assuredly have been proper. As we explain above, however, the potential applicability of a general federal criminal statute does not foreclose assimilation of a state law that is more precisely directed at a particular evil.[8] Indeed, the courts in Webb, Phillip, and Harris affirmed the defendants' convictions on the assimilated state charges notwithstanding the fact that in each case the conduct at issue was also violative of the federal murder statute. Similarly in the instant case, the fact that petitioners' conduct was subject to prosecution under the federal murder statute did not preclude assimilation, under the ACA, of a state law specifically directed to the murder of children.

Because petitioners were properly tried and convicted pursuant to the Louisiana child murder statute and the ACA, their sentences of life imprisonment were consistent with -- indeed, dictated by -- applicable law. The Assimilative Crimes Act provides that a person who commits a state crime on a federal enclave "shall be guilty of a like offense and subject to a like punishment." 18 U.S.C. 13(a). In sentencing a defendant convicted of an assimilated state crime,

[8] At the time of the prosecutions and convictions in Webb, Phillip, and Harris, Texas, Kentucky, and Wyoming had not criminalized child murder. See Tex. Penal Code Ann. § 1902; Ky. Rev. Stat. Ann. § 507.020. The Wyoming murder statute currently classifies as first degree murder the killing of a child in the course of child abuse. Wyo. Stat. § 6-2-101. That provision was added to the code in 1994, well after the 1981 decision in Harris.

a court generally applies the Sentencing Guidelines provisions applicable to the most closely analogous federal crime. State law, however, establishes both the minimum and maximum penalties to which the defendant may be exposed. See United States v. Pierce, 75 F.3d 173, 176 (4th Cir. 1996); United States v. Garcia, 893 F.2d 250, 254 (10th Cir. 1989), cert. denied, 494 U.S. 1070 (1990); United States v. Leake, 908 F.2d 550, 553 (9th Cir. 1990); United States v. Marmolejo, 915 F.2d 981, 984 (5th Cir. 1990).

The Louisiana first degree murder statute provides for a mandatory life sentence if the government does not seek the death penalty. 14 La. Rev. Stat. Ann. § 30C. The United States did not seek the death penalty in this case. The district court was therefore required to sentence petitioners to life imprisonment. The court's consideration of the Sentencing Guidelines (see page 6, supra) was thus superfluous; but the sentence imposed by the court was mandated by Louisiana law and was therefore correct under the ACA.

2. Petitioner Debra Lewis contends (96-7151 Pet. 9-11) that the court of appeals erred in affirming her conviction. The premise of petitioner's argument is that the court of appeals correctly concluded that assimilation of the Louisiana child murder statute was improper. As explained above, that premise is mistaken. Even if that premise were correct, however, it would not support reversal of petitioner's conviction.[9] The courts of

[9] Petitioner James Lewis concedes that the "appropriate remedy is not reversal of the conviction." 96-7726 Pet. 9.

appeals agree that a conviction pursuant to an improperly assimilated state statute may be affirmed where the essential elements of the preemptive federal crime have been proved at trial and found by the jury. See United States v. Hall, 979 F.2d 320, 323 (3d Cir. 1992); United States v. Lavender, 602 F.2d 639, 641 (4th Cir. 1979); United States v. Walker, 557 F.2d 741, 746 (10th Cir. 1977); United States v. Chaussee, 536 F.2d 637, 644-645 (7th Cir. 1976); United States v. Word, 519 F.2d 612, 618 (8th Cir.), cert. denied, 423 U.S. 934 (1975); United States v. Olvera, 488 F.2d 607, 608 (5th Cir. 1973), cert. denied, 416 U.S. 917 (1974); Hockenberry v. United States, 422 F.2d 171, 174 (9th Cir. 1970). Petitioner Debra Lewis cites no contrary authority.

In this case, the court of appeals correctly held that the government had proved, and the jury had found in returning its verdict on the assimilated state charge, all of the elements of federal second degree murder. Pet. App. 12-16. The court focused in particular on the federal statute's requirement that the defendant act with "malice aforethought." 18 U.S.C. 1111(a). In Lara v. Parole Comm'n, 990 F.2d 839, 841 (5th Cir. 1993), the court outlined the three distinct mental states encompassed by malice aforethought: 1) intent to kill; 2) intent to do serious bodily injury; and 3) extreme recklessness and wanton disregard for human life. See also United States v. Shaw, 701 F.2d 367, 392 n.20 (5th Cir. 1983) (malice does not require subjective intent to kill, but may be established by evidence of conduct which is "reckless and wanton and a gross deviation from the reasonable standard of care"

such that a jury can infer that defendant was aware of serious risk of death or bodily harm), cert. denied, 465 U.S. 1067 (1984); accord United States v. Sheffey, 57 F.3d 1419, 1430 (6th Cir. 1995), cert. denied, 116 S. Ct. 749 (1996); United States v. Ryan, 9 F.3d 660, 671 n.11 (8th Cir. 1994), on rehearing en banc, 41 F.3d 361 (8th Cir. 1994), cert. denied, 115 S. Ct. 1793 (1995); United States v. Sides, 944 F.2d 1554, 1558 (10th Cir.), cert. denied, 502 U.S. 989 (1991); United States v. Fleming 739 F.2d 945, 947-948 (4th Cir. 1984), cert. denied, 469 U.S. 1193 (1985); United States v. Cox, 509 F.2d 390, 392 (D.C. Cir. 1974).

In accordance with the language of the Louisiana child murder statute, the district court instructed the jury that it could convict petitioners only if it found that they had "acted with specific intent to kill or inflict great bodily harm." Pet. App. 16. In light of the comparable intent standards embodied in the state and federal laws, petitioner Debra Lewis's claim of prejudice, because of a purportedly "easier burden of proof" required of the government under the Louisiana law, 96-7151 Pet. 12, is without merit. There would consequently be no basis for reversal of petitioner's conviction even if the assimilation of the Louisiana child murder statute were improper.[10]

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[10] If the application of the ACA to petitioners had been improper, the appropriate remedy would be to remand for resentencing, pursuant to the Sentencing Guidelines, on the federal offense of second degree murder. See 96-7726 Pet. 9-10; United States v. Lavender, 602 F.2d at 641; United States v. Walker, 557 F.2d at 746; United States v. Chaussee, 536 F.2d at 644-45; United States v. Word, 519 F.2d at 618; Hockenberry v. United States, 422 F.2d at 174. We do not agree with the court of appeals' conclusion (see Pet. App. 16-17) that resentencing would be unnecessary simply

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1997

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because the terms of imprisonment imposed by the district court fell within the statutory maximum sentence for second degree murder under federal law.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

Nos. 96-7151 and 96-7726

DEBRA FAYE LEWIS, PETITIONER

v.

UNITED STATES OF AMERICA

JAMES M. LEWIS, PETITIONER

v.

UNITED STATES OF AMERICA

CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served copies of the **BRIEF FOR THE UNITED STATES IN OPPOSITION** by first class mail, postage prepaid, on this 28th day of March, 1997.

See Attached Service Lists

Walter Dellinger/cs

WALTER DELLINGER
Acting Solicitor General

March 28, 1997

96-7151
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No. 96-7151

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

DEBRA FAYE LEWIS,
Petitioner,
v.
UNITED STATES,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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JOINT APPENDIX

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PETITION FOR CERTIORARI FILED DECEMBER 16, 1996
CERTIORARI GRANTED MAY 12, 1997

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RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
01/04/94	Indictment as to James Lewis (1) count(s), 1, Debra Faye Lewis (2) count(s)
02/11/94	Motion by Debra Faye Lewis to dismiss indictment
04/07/94	Memorandum ruling as to motion to dismiss indictment as to Debra Faye Lewis to dismiss indictment as to James M. Lewis; said motions shall be denied for reasons stated herein
04/07/94	Order in accordance with Memorandum Ruling denying motion to dismiss indictment as to Debra Faye Lewis, denying motion to dismiss indictments as to James M. Lewis
04/15/94	Notice of Interlocutory Appeal by Debra Faye Lewis re order entered 4/7/94 by Judge James T. Trimble, Jr.
08/02/94	Judgment of USCA as to James M. Lewis, Debra Faye Lewis Re: Interlocutory appeal, Interlocutory appeal DISMISSED, motion of appellee to dismiss is granted.
03/06/95	Minutes of Jury trial Day 1 as to James M. Lewis, Debra Faye Lewis held
03/07/95	Minutes of Jury trial Day 2 as to James M. Lewis, Debra Faye Lewis held
03/08/95	Minutes of Jury trial Day 3 as to James M. Lewis, Debra Faye Lewis held
03/09/95	Minutes of Jury trial Day 4 as to James M. Lewis, Debra Faye Lewis held
03/10/95	Minutes of Jury trial Day 5 as to James M. Lewis, Debra Faye Lewis held
03/13/95	Minutes of Jury trial Day 6 as to James M. Lewis, Debra Faye Lewis held
03/14/95	Minutes of Jury trial Day 7 as to James M. Lewis, Debra Faye Lewis held

DATE	PROCEEDINGS
03/14/95	Court's instruction to the jury as to James M. Lewis, Debra Faye Lewis
03/14/95	Jury verdict as to Debra Faye Lewis Guilty: Debra Faye Lewis
08/22/95	Minutes of Sentencing before Judge James T. Trimble, Jr. as to Debra Faye Lewis
08/22/95	Judgment Debra Faye Lewis (2) count(s) 1.
08/22/95	Conditions of probation and supervised release as to Debra Faye Lewis
08/30/95	Notice of Appeal from judgment order entered 8/23/95 signed by Judge James T. Trimble, Jr., filed Debra Faye Lewis

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

Criminal No. CR94-20001-01; 02
18 U.S.C. §§ 7, 13 & 2
La. R.S. 14:30(5)

JUDGE TRIMBLE
MAGISTRATE JUDGE WILSON

UNITED STATES OF AMERICA

v.

JAMES M. LEWIS—01
DEBRA FAYE LEWIS—02

INDICTMENT

THE GRAND JURY CHARGES:

COUNT I

That on or about the 20th day of December, 1993, at Fort Polk, Louisiana, in the Western District of Louisiana, upon lands acquired for the use of the United States and under the exclusive jurisdiction thereof, JAMES M. LEWIS and DEBRA FAYE LEWIS, defendants herein, each knowingly and willfully aided and abetted, one by the other, did, with specific intent to inflict great bodily harm, commit first degree murder of Jadasha D. Lowery, a human being under the age of twelve years, in violation of Title 14, Louisiana Revised Statutes Annotated, Section 30(5), [amended 3-6-95 to 30A(5),] all in violation of

Title 18, United States Code, Sections 7, 13 and 2. (18 U.S.C. §§ 7, 13 & 2; La. R.S. 14:30(5) [amended 3-6-95 to 30A(5)]).

A TRUE BILL:

/s/ Roger Wiltz
Foreperson: Federal Grand Jury

MICHAEL D. SKINNER
United States Attorney

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

(Title Omitted)

MOTION TO DISMISS INDICTMENT

NOW INTO COURT, through undersigned counsel, comes DEBRA FAYE LEWIS, who moves to dismiss the indictment filed against her on January 4, 1994 charging her with First Degree Murder of Jadasha D. Lowery in violation of Title 14 Louisiana Revised Statutes Annotated, Section 30(5) and in violation of Title 18 United States Code, Section 7, 13, and 2. [18 U.S.C. Section 7, 13, and 2; La. R.S. 14:30(5)].

1.

Mover, DEBRA FAYE LEWIS, alleges upon information and belief that the Federal indictment incorporates and adopts a violation of Louisiana law, LSA-R.S. 14:30(5), First Degree Murder, through the "Assimilative Crimes Act" of the United States Code, 18 U.S.C. Sections 7, 13, and 2, as a violation of Federal law.

2.

Mover, DEBRA FAYE LEWIS, alleges upon information and belief that the alleged crime for which she was charged occurred upon lands required for use of the United States under the exclusive jurisdiction thereof, to-wit: the alleged crime occurred on the military reservation at Fort Polk, Vernon Parish, Louisiana, within the Western District of Louisiana.

3.

Mover, DEBRA FAYE LEWIS, alleges upon information and belief that the United States Code specifically provides for the crime of First Degree Murder in Title 18 United States Code, Section 1111 (18 U.S.C. Section 1111) and that this section preempts all state law as it provides for and creates a crime which is committed upon lands acquired for the exclusive use of the United States and under the exclusive jurisdiction of the United States. The congressional intent in creating a specific federal crime for First Degre Murder indicates a desire to regulate and punish the action which defendant is alleged to have committed, thereby preempting the assimilation or adaptation of similar state crimes.

4.

Mover, DEBRA FAYE LEWIS, alleges upon information and belief that the indictment filed on January 4, 1994 is invalid and improper insofar as it charges her with First Degree Murder in violation of Louisiana Revised Statute LSA-R.S. 14:30(5) [LSA-R.S. 14:30(5)]. This criminal conduct was specifically preempted by Federal law. The Assimilative Crimes Statute, 18 U.S.C. Sections 7, 13, and 2, provides that only if there are no Federal criminal laws applicable to the alleged conduct may the United States incorporate through the Assimilative Crimes Act any State law regulating and punishing such conduct as its own. Insofar as there is a Federal law directly on point, the Assimilative Crimes Statute does not apply and the Louisiana State statute for First Degree Murder [LSA-R.S. 14:30(5)] does not apply and cannot be assimilated to charge mover with the crime of First Degree Murder pursuant to Louisiana law.

18 U.S.C., Section 13(a) reads as follows:

> "Whoever within or upon any of the places now existing or hereafter reserved or acquired as provided in section 7 of this title, is guilty of any act or omis-

> sion which, *although not made punishable by any enactment of Congress*, would be punishable if commited or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and be subject to a like punishment."

5.

For the following reasons, defendant, DEBRA FAYE LEWIS, alleges that the indictment filed on January 4, 1994 is invalid and improper, and that the indictment charging her with commission of the crime of First Degree Murder pursuant to Louisiana law, LSA-R.S. 14:30(5), should be dismissed.

Respectfully submitted,

FRANK GRANGER
A Professional Law Corporation

/s/ Frank Granger
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UNITED STATES DISTRICT COURT
W.D. LOUISIANA
LAKE CHARLES DIVISION

(Title Omitted)

April 6, 1994

MEMORANDUM RULING

TRIMBLE, District Judge.

Presently before the court are the defendants' motions to dismiss the indictment based upon the government's charging the defendants with a violation of state law under the Assimilative Crimes Act ("ACA"), instead of under 18 U.S.C. § 1111.

The ACA, 18 U.S.C. § 13, states (in pertinent part) that:

> "(a) Whoever within or upon any of the places now existing or hereinafter reserved or acquired as provided in section 7 of this title, is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to like punishment."

In the instant case, the defendants, Debra and James Lewis, are charged with the first degre murder of their

tour year old child on Fort Polk Military Installation. The first degree charge stems from the use of LSA 14:30 (A)(5) through the ACA. R.S. 14:30(A)(5) states (in pertinent part) that:

> "(A) First degre murder is the killing of a human being:
>
> (5) When the offender has the specific intent to kill or to inflict great bodily harm upon a victim under the age of twelve. . . ."

18 U.S.C. § 1111 states (in pertinent part) that murder is the killing of another human being with malice aforethought. Certain specifically enumerated aggravating factors constitute first degree murder; any other murder under this statute is murder in the second degree.

Because the state statute specifically refers to victims under twelve years of age, yet there is a federal statute that encompasses all murders, the defense argues that use of the ACA is not warranted and that the government is bound to proceed by charging the defendants with first degree murder under 18 U.S.C. 1111.

The Assimilative Crimes Act ("ACA"), 18 U.S.C. § 13, makes punishable the doing of acts on federal reservations which, "although not made punishable by Congress, would be punishable if committed or omitted" within the jurisdiction of the state in which the reservation is situated. Upon conviction of a violation under such an assimilated state law, the offender shall be subject to the punishment prescribed by the state. Read literally, any set of circumstances which constitutes a crime under state law, but not under federal law, could still be punished under state law in federal court through the ACA. The Supreme Court decision in *Williams v. United States*, 327 U.S. 711, 66 S.Ct. 778, 90 L.Ed. 962 (1946), and its progeny, indicated that this simplistic reading is not correct as will be discussed in more detail hereinafter.

The defendant in *Williams,* supra, was convicted of having carnal knowledge of an unmarried female over the age of 16 but under the age of 18 on a federal reservation in Arizona, in violation of Arizona law. It was not rape or assault with intent to rape under federal law because the required element of force was absent and the victim was over 16.

The Supreme Court held that Arizona law was not applicable under the ACA and that the defendant could not be punished thereunder for the following reasons:

> "We hold that the Assimilative Crimes Act does not make the Arizona statute applicable in the present case because (1) the precise acts upon which the conviction depends have been made penal by the laws of Congress defining adultery and (2) the offense known to Arizona as that of "statutory rape" has been defined and prohibited by the Federal Criminal Code, and is not to be redefined and enlarged by application to it of the Assimilative Crimes Act. The fact that the definition of this offense as enacted by Congress results in a narrower scope of the offense than that given to it by the State, does not mean that the Congressional definition must give way to the State definition. This is especially clear in the present case because the specified acts which would come within the additional scope given to the offense by the State through its postponement of the age of consent of the victim from 16 to 18 years of age, are completely covered by the federal crimes of adultery or fornication. (Footnotes eliminated)."

327 U.S. at 717-18, 66 S.Ct. at 781-782.

The Supreme Court ruled that the ACA should be interpreted as not allowing federal prosecution for state law violations where the exact act (intercourse, or intercourse with a minor) was already a criminal offense under federal law and only the definition or boundary definition or boundary condition differed in the state law. *Id.* at 717, 66 S.Ct. at 781. The Court emphasized that Congress had already considered the question of the proper age of consent for the federal crime of statutory rape, and had determined that it should be sixteen, as was reflected in the pertinent statute. *Id.,* 724-25, 66 S.Ct. at 784-85. The Court then reasoned that it would be using the state law to expand rather than to supplement the federal law to allow prosecution under a state law which more broadly defined and penalized the same offense. *Id.,* at 717, 66 S.Ct. at 781.

The defendant in *U.S. v. Eades,* 615 F.2d 617 (4th Cir.1980), who was charged with a variety of offenses, moved for dismissal of two counts based upon improper use of the ACA. The district court denied the motion and the defendant appealed.[1] The Fourth Circuit reversed the District Court and held that by enacting the comprehensive federal assault statute, Congress preempted the Maryland statute defining the crime of third degree sexual offense and that the ACA did not make the Maryland third degree sexual offense statute applicable to acts committed on a federal reservation. The Government moved for a rehearing *en banc,* which was *granted. U.S. v. Eades,* 633 F.2d 1075 (4th Cir.1980), cert. den. 450 U.S. 1001, 101 S.Ct. 1709, 68 L.Ed.2d 203 (1981). Upon rehearing, the *en banc* court reversed the prior panel and held that the defendant's conviction for third degree sexual offense under the ACA was not proscribed by the federal statute, 18 U.S.C. § 113. The key factor that the court relied upon in reaching this conclusion was congressional intent. After examining federal law, the court

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[1] This appeal was consolidated with an appeal from a judgment convicting Larry F. Wilson of assault with intent to commit rape in violation of federal law and in violation of third degree sexual offense in violation of Maryland law.

found that Congress has considered sexual offenses in 18 U.S.C. § 2032 and 18 U.S.C. § 113 dealt entirely with assault.[2] The court reasoned that Congress did not intend to deal with sexual offenses in § 113, therefore the state statute could be assimilated because there was no relevant federal statute proscribing the specific conduct in which the defendant was engaged.

The Maryland statute under which both defendants in *Eades* were convicted proscribed as a "third degree sexual offense" sexual contact by one against the will and without the consent of another where the accused threatens or places the victim in fear of, *inter alia*, death, serious injury or kidnapping. Art. 27, § 461, Ann.Code of Md. (1976 Repl.Vol. and 1978 Cum.Supp.) defined "sexual contact" to include the intentional touching of the anal or genital area for the purposes of sexual arousal or gratification. The explicit elements of the offense of a "third degree sexual offense" as defined in the Maryland statute were not included verbatim in the federal assault statute. The government asserted that, because the federal statute did not proscribe the precise conduct proscribed by the state statute, the state law was applicable. The Court of Appeal in the *en banc* hearing agreed.

As in *Williams* and *Eades*, it could be argued that the federal staute in the case at bar, 18 U.S.C. § 1111 (murder of a human being), makes the "precise acts" upon which the conviction depends penal by the laws of Congress, the "precise act" arguably being the taking of another's life. It could also be argued that although the government concedes that the "precise act" of murder is congressionally proscribed in 18 U.S.C. § 1111, the federal statute does not address the compelling state interest

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[2] In § 113 there is only one reference to sexual assault in that assault with the intent to commit murder or rape is prohibited by § 113(a).

in the protection of children under the age of twelve. The Government asserts that Congress has not addressed the widespread and pervasive amount of child abuse which results in serious injury or death to children under the age of twelve and that the state statute addresses this issue in LSA R.S. 14:30(A)(5), with which the defendants in this case are charged.

The seriousness and compelling state interests involved in providing adequate criminal sanctions for child abuse notwithstanding, it appears at first glance that the facts of the case at bar are strikingly similar to the facts in *Williams*. The specific acts which would come within the additional scope given to the state offense by the State incorporating the element of murdering a child under the age of twelve is covered by the federal crime of murder, even though no victim age is delineated. The Louisiana statute merely incorporates a special form of murder . . . the murder of a child under the age of twelve. One cannot violate R.S. 14:30(A)(5) without violating some form of 18 U.S.C. § 1111. Yet, a further review of case law, including but not limited to the Fifth Circuit, brings this court to a different conclusion.

In *U.S. v. Bowers*, 660 F.2d 527 (5th Cir. 1981), a case of child abuse which resulted in the death of a two and a half year old, the applicable Georgia statute was applied through the Assimilative Crimes Act, although the court did not discuss the arguments which are now before the court. The Fifth Circuit affirmed the use of the ACA even though the issue of federal preemption was not discussed by the court at that time.

The case of *U.S. v. Brown*, 608 F.2d 551 (5th Cir. 1979), also involved injury to a child. The defendant in this case was charged under the ACA with having recklessly or with criminal negligence engaged in conduct causing serious injury to a child. The Fifth Circuit in this case held that although the acts with which the defendant was

charged could have been punished under the federal assault statute, the Government properly proceeded under the state child abuse statute under the ACA, as the "precise act" of injury to a child was not proscribed by federal law and the state statute was designed to punish specific conduct of a different character than that forbidden by the state statute.

The appellant in *Brown* relied on *Williams* and on *U.S. v. Butler,* 541 F.2d 730 (8th Cir.1976), to argue that the prosecution under the state child abuse statute must be barred because the conduct charged is punishable under the federal criminal assault provisions of 18 U.S.C. § 113. The Fifth Circuit held, however, that neither *Williams* nor *Butler* supported this contention because both of these cases dealt with attempts to enlarge the scope of a congressionally defined penal offense by the application of a "conflicting state definition" under the ACA.

In *Williams,* the Fifth Circuit reasoned that the federal law required a victim under the age of 16, whereas the state law allowed for a victim under 18. The defendant in *Williams* could not have been prosecuted under the federal law. The Supreme Court, then, set aside the conviction as an improper use of the ACA to expand a federal statute.

The defendant in *Butler* successfully overturned his state law conviction using the same reasoning as *Williams.* Although both the federal and state law proscribed the possession of a firearm by a felon, only the federal statute required interstate travel. The government lacked proof of interstate travel, therefore they proceeded under the state statute. Relying on *Williams,* the Eighth Circuit overturned Butler's conviction.

The ACA has been held to mean that prosecution for state crimes under the ACA may not occur when the "precise act" prohibited by the state law is defined and prohibited by the federal statute. *Williams,* supra; *U.S. v. Brown,* at 554; *U.S. v. Big Crow,* 523 F.2d 955 (8th Cir.

1975), cert. den. 424 U.S. 920, 96 S.Ct. 1126, 47 L.Ed. 2d 327; *U.S. v. Patmore,* 475 F.2d 752 (10th Cir.1973).

In the case now before the court, the acts with which the defendants are charged could be punishable under the federal murder statute, but the "precise act" of killing a child under the age of twelve is not murder in the first degree under federal law. *Brown,* at 554; see also *Fields v. U.S.,* 438 F.2d 205 (2d Cir.1971), cert. den. 403 U.S. 907, 91 S.Ct. 2214, 29 L.Ed.2d 684 The Lewises are being prosecuted in this case under a state statute designed to punish specific conduct of a different character than that proscribed in the federal murder statute. The state statute is specifically designed to provide a deterrent to child abuse, a subject which is not addressed by federal law.

Other circuits have followed this reasoning as well. A defendant who allegedly recklessly shot a fellow hunter on federal land was indicted in the Sixth Circuit for violating the Assimilative Crimes Act, based upon a violation of Tennessee law. *U.S. v. Griffith,* 864 F.2d 421 (6th Cir.1988), cert. den. 490 U.S. 1111, 109 S.Ct. 3167, 104 L.Ed.2d 1029. The district court dismissed the indictment, but the court of appeal reversed holding that the defendant could be properly prosecuted under the Tennessee assault statute, pursuant to the Assimilative Crimes Act, even though there was a federal statute. The federal statute in that case only punished assaults committed with specific intent. The state statute operated on essentially a different theory and also punished reckless assaults.

In *U.S. v. Chaussee,* 536 F.2d 637 (7th Cir.1976), the defendant was found guilty of aggravated battery on a government reservation. The defendant had stabbed another inmate of the U.S. Penitentiary at Marion without provocation. The appellant's position was that although the federal and state statutes were worded somewhat differently, both statutes covered the same type of crime and

thus, only the federal statute (with its lower penalty provision) was applicable.

Chaussee again involved the federal assault statute. The court reasoned that "assault" in the federal statute is a "more inclusive term" than "assault" as used in the state statute. The legislative history of 18 U.S.C. § 113 reveals that Congress used the term "assault" to including striking, beating and wounding which would otherwise be considered batteries under state law as distinguished from simple "assault" defined in 18 U.S.C. § 113(e) and therefore, the ACA was not properly used in this instance.[3]

The Sixth Circuit in *Griffith* examined the cases arising after *Williams* and grouped them into four principal categories:

> 1) cases in which all actions criminal under federal law are criminal under state law, but under state law additional acts are criminal as well [4];
>
> 2) cases in which the federal law encompasses a broader area than the state law and in which the state law usually carries greater penalties or ease of proof [5];

[3] The court stated that it was an established rule in the Seventh Circuit that "[w]here the government wrongly secures a conviction under the Assimilated Crimes Act, rather than under the relevant federal statute, the appropriate remedy is not a reversal of the conviction, but rather a vacating of the sentence and a remand to the district court for resentencing." *Id.*, at p. 645, citing *U.S. v. Word*, 519 F.2d 612, 618 (8th Cir. 1975).

[4] *U.S. v. Williams*, supra.

[5] *Shirley v. U.S.*, 554 F.2d 767, 768-769 (6th Cir.1977); (state law charge of armed robbery was a more specific and more harshly punished form of the federal crime of robbery; court held that where the federal crime "already occupied the field", the ACA could be used simply to enhance punishment or to facilitate conviction); *U.S. v. Big Crow*, 523 F.2d 955, 958 (8th Cir. 1975) (state law prohibited assault resulting in serious bodily injury; court held that federal assault statute applied even if less severe penalty attaches).

> 3) cases in which the state and federal laws overlap to a degree, but each occupies an area not covered by the other [6]; and
>
> 4) cases which involve the same pattern of laws as the preceding group, namely overlapping state and federal laws, but these acts fall into a disjunctive area where the acts constitute a crime under state law, but not under federal law [7].

The crux of the government's argument in the case at bar is that it is proceeding under the ACA because the state statute provides a theory essentially different from that in the federal statute, as in the third category of cases discussed above. The state statute embodies the compelling state interest in the protection of children under the age of twelve and in providing a deterrent against child abuse. The federal homicide statutes are silent in this regard.

The government asserts that Louisiana, by enacting R.S. 14:30(A)(5), has established a specially protected class of citizens, i.e., children under the age of twelve. Further, Louisiana has determined that if an individual, with specific intent to kill or to inflict bodily harm upon a victim less than twelve years of age, does so, then that action is egregious enough to classify it as first degree murder.

In support of its position, the government cited *United States v. Fesler*, 781 F.2d 384 (5th Cir.1986), cert. den.

[6] *Fields v. U.S.*, 438 F.2d 205 (2d Cir.1971), cert. den. 403 U.S. 907, 91 S.Ct. 2214, 29 L.Ed.2d 684 (1971) (the acts committed would have been a crime under the state malicious shooting statute or the federal assault statute, but the prosecution proceeded under state law through the ACA; court held use of ACA proper because the two statutes involved completely different theories of criminal conduct); See also *U.S. v. Brown*, 608 F.2d 551 (5th Cir.1979) (state child abuse statute better fit the facts of the case even though the case could have been prosecuted under the federal assault statute).

[7] *U.S. v. Griffith*, supra.

476 U.S. 1118, 106 S.Ct. 1977, 90 L.Ed.2d 661, in which the Fifth Circuit upheld the conviction of defendants charged with violating the Texas child abuse statute. The court reasons that "it is important that the state statute seeks to punish a particular offense at which the federal statute is not aimed, child abuse." 781 F.2d at 391.

Although the defendants' memoranda in support of their motions to dismiss seem to posit that the government would be required to prosecute the defendants for first degree murder under the federal statute if they are prosecuting for first degree murder under the state statute, this is not the case. 18 U.S.C. § 1111 requires specific intent to kill or malice aforethought for a conviction of first degree murder. The statute also lists certain aggravating factors which would classify certain other murders as "first degree". The statute states that all other murders are murders in the second degree. LSA R.S. 14:30(A)(1) requires specific intent to kill or to inflict great bodily harm. The state statute in R.S. 14:30(A)(5) also defines first degree murder, however, as the killing of a human being when the offender has specific intent to kill or inflict great bodily harm upon a victim under the age of twelve or sixty-five years of age or older.

Considering that the state statute seeks to punish child abuse, a particular offense at which the federal statute is not aimed and that the "precise act" constituting first degree murder under the state statute is different from the federal definition of first degree murder, this court holds that the use of the ACA is proper and the defendants' motions to dismiss will be denied.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

(Title Omitted)

NOTICE OF APPEAL

NOTICE is hereby given that DEBRA FAYE LEWIS, defendant in the above captioned and numbered matter, hereby appeals to the United States Court of Appeals for the Fifth Circuit from that judgment entered by the Honorable James T. Trimble, Jr., United States District Judge, on April 5, 1994, mailed on April 7, 1994 and received on April 14, 1994, denying the motion of the defendant to dismiss the indictment.

The defendant, DEBRA FAYE LEWIS, alleges that the denial of the Motion to Dismiss Indictment is erroneous and that an appeal to the United States Court of Appeals for the Fifth Circuit should be granted and that this matter be reversed and remanded for further proceedings.

Lake Charles, Calcasieu Parish, Louisiana, this 15th day of April, 1994.

By her Attorney,

FRANK GRANGER
A Professional Law Corporation

/s/ Frank Granger
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(318) 439-2732

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-40363

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

DEBRA FAYE LEWIS and JAMES M. LEWIS,
Defendants-Appellants.

Appeal from the United States District Court
for the Western District of Louisiana

Before KING, JOLLY and BENAVIDES, Circuit Judges.

BY THE COURT:

IT IS ORDERED that the motion of appellee to dismiss the appeal is GRANTED. Appeal DISMISSED.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

HON. JAMES T. TRIMBLE, Judge Presiding

Case No. CR94-20001-01/02

UNITED STATES OF AMERICA

vs.

JAMES M. LEWIS and DEBRA FAYE LEWIS

MINUTES OF COURT

Date: March 6, 1995

A conference was held in Chambers. On motion of the Government, the indictment is ordered amended to add a capital A to the Louisiana Statute [14 Louisiana Revised Statutes Annotated, Section 30A(5)]

The Government moves to have the Court instruct the jury this is a non-death penalty case and the motion is GRANTED without objections.

Jury selection is discussed.

In response to an inquiry by Mr. Granger, the Court rules it will not sequester the jury at this time.

Case called for jury trial, 1st day.

The following jurors were selected and sworn to try the case:

(1) 77. Vernon E. Coles
(2) 17. Elda Marie Fulton
(3) 13. Tracy L. Morgan
(4) 6. Clifton L. Morris, Jr.
(5) 58. Johnny Lee Cormier
(6) 9. Rachel Cormie Barrow
(7) 21. Paula F. Mayo
(8) 71. Jimmie A. Guillot
(9) 1. L. J. Bass, Sr.
(10) 63. Joseph P. Crawford
(11) 27. Paulette B. Richards
(12) 28. Donald B. Dupre, Jr.
(Alt1) 44. Lena Mae Fruge
(Alt2) 29. Ronald E. Brisendine
(Alt3) 70. William C. Borkowski

Witnesses were sworn and sequestered. Opening statements were made by both sides. Testimony and evidence for the government were begun.

Trial will resume Tuesday, March 7, 1995 at 9:00 A.M.

Date: March 7, 1995

A hearing was held outside the presence of the jury to determine admissibility of photographic evidence. All spectators are removed from the courtroom. The court does not consider the photographs unnecessarily duplicative and will allow the photographs to be admitted.

Case called for trial by jury. 2nd day.

Testimony and evidence for the government continued.

Trial will resume Wednesday, March 8, 1995 at 9:00 A.M.

Date: March 8, 1995

Case called for trial by jury. 3rd day.

Testimony and evidence for the government continued.

Trial will resume Thursday, March 9, 1995 at 9:00 A.M.

Date: March 9, 1995

Case called for trial by jury. 4th day.

Testimony and evidence for the government continued.

A hearing is held outside the presence of the jury to determine the voluntariness of the statements given by the defendants. The Court advises the defendants of their rights. Witnesses called at the hearing are:

1. Gordon Devore
2. Harry Deal
3. Debra Faye Lewis

Mr. Singleton objects to advise of rights given to James M. Lewis and the objection is overruled.

The Court rules the statement given by James M. Lewis was given freely and voluntarily and adequate warning was given as to constitutional rights.

The Court rules Mrs. Lewis was adequately advised of her constitutional rights and her statements were made freely and voluntarily and pursuant to adequate advise of constitutional rights.

Mr. Regan informs the Court he was not provided with a copy of the psychiatrist report of the examination of

Debra Faye Lewis, pursuant to FRCrP 12.2. Mr. Granger states there is no report and he does not intend to use an insanity defense. Mr. Granger contends the motion and order for appointment of psychiatrist was adequate notice and the Government was provided a copy. The Court rules the motion and order served on the Government was adequate notice. The Court inquires if the Government has requested expert testimony? Counsel may present further arguments at 8:30 A.M. on Friday, March 10, 1995.

Trial will resume Friday, March 10, 1995 at 9:00 A.M.

Date: March 10, 1995

The Court amends its ruling (concerning the psychiatrist report of Debra Faye Lewis) in view of the notice requirement in FRCrP 12.2b to require Mr. Granger to state on the record what kind of defense he will rely on and Mr. Granger complies with the Court's instructions.

Counsel for the Government requests the Court give a 404.b limited instruction on similar acts. Mr. Singleton objects and the instruction is not given.

Case called for trial by jury. 5th day.

Testimony and evidence for the government concluded with the exception of calling one witness out of order on Monday morning.

Trial will resume Monday, March 13, 1995 at 9:00 A.M.

A jury charge conference is held.

Both defense counsel object to a "similar crimes" instruction to the jury and the Government wants the instruction included. The Court rules such instruction will not be given.

A supplemental charge conference will be held before the Court actually instructs the jury.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

(Title Omitted)

COURT'S INSTRUCTION TO THE JURY

You have now heard all of the evidence in the case as well as the final arguments of the lawyers for the parties.

It is my duty, therefore, to instruct you on the rules of law that you must follow and apply in arriving at your decision in the case.

In any jury trial there are, in effect, two judges. I am one of the judges; the other is the jury. It is my duty to preside over the trial and to determine what testimony and evidence is relevant under the law for your consideration. It is also my duty at the end of the trial to explain to you the rules of law that you must follow and apply in arriving at your verdict.

First, I will give you some general instructions which apply in every case, for example, instructions about burden of proof and how to judge the believability of witnesses. Then I will give you some specific rules of law about this particular case, and finally I will explain to you the procedures you should follow in your deliberations.

You, as jurors, are the judges of the facts. In determining what actually happened in this case—that is, in reaching your decision as to the facts—it is your sworn duty to follow all of the rules of law as I explain them to you.

You must follow all of my instructions as a whole. You have no right to disregard or give special attention to any

one instruction, or to question the wisdom or correctness of any rule I may state to you. That is, you must not substitute or follow your own notion or opinion as to what the law is or ought to be. It is your duty to apply the law as I give it to you, regardless of the consequences.

By the same token it is also your duty to base your verdict solely upon the testimony and evidence in the case, without prejudice or sympathy. That was the promise you made and the oath you took before being accepted by the parties as jurors in this case, and they have the right to expect nothing less.

The defendants have been charged by the government with violations of federal law. The indictment is simply the description of the charge made by the government against the defendants; it is not evidence of their guilt. Indeed, each defendant is presumed by the law to be innocent. The law does not require a defendant to prove his innocence or produce any evidence at all and no inference whatever may be drawn from the election of the defendant not to testify. A defendant is presumed innocent throughout your deliberations until such time, if ever, you as a jury are satisfied that the government has proven him guilty beyond a reasonable doubt. The government has the burden of proving a defendant guilty beyond a reasonable doubt, and if it fails to do so, you must acquit the defendant.

Thus, while the government's burden of proof is a strict or heavy burden, it is not necessary that a defendant's guilt be proved beyond all possible doubt. It is only required that the government's proof exclude any "reasonable doubt" concerning the defendant's guilt.

A "reasonable doubt" is a doubt, based upon reason and common sense after careful and impartial consideration of all the evidence in the case.

Proof beyond a reasonable doubt, therefore, is proof of such a convincing character that you would be willing

to rely and act upon it without hesitation in the most important of your own affairs. If you are convinced that the accused has been proved guilty beyond reasonable doubt, say so. If you are not convinced, say so.

As stated earlier it is your duty to determine the facts, and in so doing you must consider only the evidence I have admitted in the case. The term "evidence" includes the sworn testimony of the witnesses and the exhibits admitted in the record.

Remember that any statements, objections or arguments made by the lawyers are not evidence in the case. The function of the lawyers is to point out those things that are most significant or most helpful to their side of the case, and in so doing to call your attention to certain facts or inferences that might otherwise escape your notice. In the final analysis, however, it is your own recollection and interpretation of the evidence that controls in the case. What the lawyers say is not binding upon you.

Also, during the course of a trial I occasionally make comments to the lawyers, or ask questions of a witness, or admonish a witness concerning the manner in which he should respond to the questions of counsel. Do not assume from anything I may have said that I have any opinion concerning any of the issues in this case. Except for my instructions to you on the law, you should disregard anything I may have said during the trial in arriving at your own findings as to the facts.

So, while you should consider only the evidence in the case, you are permitted to draw such reasonable inferences from the testimony and exhibits as you feel are justified in the light of common experience. In other words you may make deductions and reach conclusions which reason and common sense lead you to draw from the facts which have been established by the testimony and evidence in the case.

In considering the evidence, you may make deductions and reach conclusions which common sense and reasoning lead you to make; and you should not be concerned about whether the evidence is direct or circumstantial evidence. "Direct evidence" is the testimony of one who asserts actual knowledge of a fact, such as an eye witness. "Circumstantial evidence" is proof of a chain of facts and circumstances indicating either the guilt or innocence of the defendant. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. It requires only that you weigh all of the evidence and be convinced of the defendant's guilt beyond a reasonable doubt before he can be convicted.

I remind you that it is your job to decide whether the government has proved the guilt of the defendant beyond a reasonable doubt. In doing so, you must consider all of the evidence. This does not mean, however, that you must accept all of the evidence as true or accurate.

You are the sole judges of the credibility or "believability" of each witness and the weight to be given to his or her testimony. An important part of your job will be making judgments about the testimony of the witnesses who testified in this case. You should decide whether you believe what each person had to say, and how important that testimony was. In making that decision I suggest that you ask yourself a few questions: Did the person impress you as honest? Did the witness have any particular reason not to tell the truth? Did the witness have a personal interest in the outcome of the case? Did the witness have any relationship with either the government or the defense? Did the witness seem to have a good memory? Did the witness have the opportunity and ability to understand the questions clearly and answer them directly? Did the witness's testimony differ from the testimony of the other witnesses? These are a few of the considerations that will help you determine the accuracy of what each witness has said.

In making up your mind and reaching a verdict, do not make any decisions simply because there were more witnesses on one side than on the other. Do not reach a conclusion on a particular point just because there were more witnesses testifying for one side on that point. Your job is to think about the testimony of each witness you have heard and decide how much you believe of what each witness had to say.

During the trial you heard the testimony of individuals described as expert witnesses.

If scientific, technical, or other specialized knowledge might assist the jury in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify and state an opinion concerning such matters.

Merely because an expert witness has expressed an opinion does not mean, however, that you must accept this opinion. The same as with any other witness, it is only up to you to decide whether you believe this testimony and choose to rely on it. Part of that decision will depend on your judgment about whether the witness's background or training and experience is sufficient for the expert witness to give the expert testimony that you heard. You must also decide whether the witness's opinions were based on sound reasons, judgment, and information.

You must give separate consideration to the evidence as to each defendant.

In determining whether any statement, claimed to have been made by any defendant outside of court and after an alleged crime has been committed, was knowingly and voluntarily made, you should consider the evidence concerning such a statement with great care, and should give such weight to the statement as you feel it deserves under the circumstances.

You may consider in that regard such factors as the age, sex, training, education, occupation, and physical and

mental condition of the defendant, his or her treatment while under interrogation, and all the other circumstances in evidence surrounding the making of the statement.

Of course, any such statement should not be considered in any way whatsoever as evidence with respect to any other defendant on trial.

I caution you, members of the jury, that you are here to determine the guilt or innocence of each accused from the evidence in this case. You are here to decide whether the government has proved beyond a reasonable doubt that each defendant is guilty of the crimes with which he or she is charged. No defendant is on trial for any act or conduct or offense not alleged in the Indictment.

The indictment in this case charges that on or about the 20th day of December, 1993, at Fort Polk, Louisiana, in the Western District of Louisiana, upon lands acquired for the use of the United States and under the exclusive jurisdiction thereof, James M. Lewis and Debra Faye Lewis, defendants herein, each knowingly and wilfully aided and abetted, one by the other, did, with specific intent to inflict great bodily harm, commit first degree murder of Jadasha D. Lowery, a human being under the age of twelve years, in violation of Title 14, Louisiana Revised Statutes Annotated, Section 30(A)(5), all in violation of title 18, United States Code, Sections 7, 13, and 2.

First degree murder pursuant to Louisiana Revised Statute 14:30(A)(5) is the killing of a human being while the offender acted with specific intent to kill or to inflict great bodily harm and in addition: the victim is under the age of twelve.

Specific criminal intent is that state of mind which exists when the circumstances indicate that a defendant actively desired the prescribed criminal consequence to follow his act or failure to act.

Thus, in order to convict either of the defendants of First Degree Murder, you must find:

1. That said defendant killed Jadasha D. Lowery on or about December 20, 1993; and

2. That said defendant acted with specific intent to kill or inflict great bodily harm; and

3. The victim was under twelve years of age.

To convict either of the defendants of the offense charged, you must find beyond a reasonable doubt that the government proved every element of First Degree Murder.

If you are not convinced that a defendant is guilty of First Degree Murder, you may find that defendant guilty of a lesser offense, if you are convinced beyond a reasonable doubt that said defendant is guilty of a lesser offense.

The following are responsive lesser offenses:

1. Second Degree Murder

2. Manslaughter

Second degree murder is the killing of a human being (1) when the offender has a specific intent to kill or inflict great bodily harm.

Thus, in order to convict either of the defendants of second degree murder, you must find:

1. That said defendant killed Jadasha D. Lowery on or about December 20, 1993; and

2. That said defendant acted with specific intent to kill or inflict great bodily harm.

Manslaughter is a homicide which would be murder if it fit the definitions of first or second degree murder as set forth above, but the offense is committed in sudden heat of passion or heat of blood immediately caused by provocation sufficient to deprive an average person of his self control and cool reflection. Provocation shall not reduce a homicide to manslaughter if the jury finds that the

offender's blood had actually cooled, or that an average person's blood would have cooled, at the same time the offense was committed; OR

Manslaughter is the killing of a human being when the defendant is engaged in the perpetration or attempted perpetration of any felony or intentional misdemeanor directly affecting the person although there is no intent to kill or to inflict great bodily harm.

Thus, in order to convict either of the defendants of Manslaughter, you must find:

1. That said defendant killed Jadasha D. Lowery on or about December 20, 1993; and

2. That said defendant had specific intent to kill or inflict great bodily harm; and

3. That the killing was committed in sudden passion or heat of blood immediately caused by provocation sufficient to deprive the average person of his or her self-control and cool reflection.

OR

1. That said defendant killed Jadasha D. Lowery on or about December 20, 1993, whether or not he or she had intent to kill; and

2. That the killing took place while said defendant was engaged in the commission or attempted commission of any felony or intentional misdemeanor.

On such felony, Cruelty to Juveniles, is defined as the intentional or criminally negligent mistreatment or neglect, by anyone over the age of seventeen, of any child under the age of seventeen, whereby unjustifiable pain and suffering is caused to said child. Criminal negligence exists when, although neither specific nor general criminal intent is present, there is such disregard of the interest of others

that the offender's conduct amounts to a gross deviation below the standard of care expected to be maintained by a reasonably careful man under like circumstances.

We have just talked about what the government has to prove for you to convict a defendant of first degree murder. Your first task is to decide whether the government has proved, beyond a reasonable doubt, that a defendant committed the crime of first degree murder. If your verdict on that is guilty, you are finished with the Indictment as to that defendant. But if your verdict is not guilty, or if you are unable to reach a verdict, you should go on to consider whether the defendant is guilty of second degree murder or manslaughter, which are lesser included offenses of the indictment.

Of course, if the government has not proved beyond a reasonable doubt that a defendant committed first degree murder, second degree murder or manslaughter, your verdict must be not guilty.

The guilt of a defendant in a criminal case may be established without proof that the defendant personally did every act constituting the offense alleged. The law recognizes that, ordinarily, anything one can do for himself or herself may also be accomplished by that person through the direction of another person as his or her agent, or by acting in concert with, or under the direction of, another person or persons in a joint effort or enterprise.

So, if another person is acting under the direction of a defendant or if a defendant joins another person and performs acts with the intent to commit a crime, then the law holds that defendant responsible for the acts and the conduct of such other person just as though the defendant had committed the acts or engaged in the conduct.

Notice, however, that before any defendant may be held criminally responsible for the acts of another it is necessary that the accused deliberately associate himself or

herself in some way with the crime and participate in it with the intent to bring about the crime; and must have the specific intent to actively desire the prescribed criminal consequences, in this instance to inflict great bodily harm or to kill.

Of course, mere presence at the scene of a crime and knowledge that a crime is being committed are not sufficient to establish that a defendant either directed or aided and abetted the crime unless you find beyond a reasonable doubt that the defendant was a participant and not merely a knowing spectator.

In other words, you may not find a defendant guilty unless the government proves beyond a reasonable doubt that every element of the offense as defined in these instructions was committed by some person or persons, and that said defendant voluntarily participated in its commission with the intent to violate the law.

If any defendant is found guilty, it will be my duty to decide what the punishment will be. You should not be concerned with punishment in any way. It should not enter your consideration or discussion.

The word "knowingly", as that term has been used from time to time in these instructions, means that the act was done voluntarily and intentionally and not because of mistake or accident.

You may find that a defendant has knowledge of a fact if you find that the defendant deliberately closed his eyes to what would otherwise have been obvious to him. While knowledge on the part of the defendant cannot be established merely by demonstrating that the defendant was negligent, careless, or foolish, knowledge can be inferred if the defendant deliberately blinded himself to the existence of a fact.

The word "wilfully", as that term is used in these instructions, means that the act was committed voluntarily

and purposely, with the specific intent to do something the law forbids; that is to say, with bad purpose either to disobey or disregard the law.

You will note that the indictment charges that the offense was committed "on or about" a specified date. The Government does not have to prove that the crime charged was committed on that exact date, so long as the Government proves beyond a reasonable doubt that a defendant committed the offense on a date reasonably near the date alleged.

Any verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agrees to it. In other words, your verdict must be unanimous. Your deliberations will be secret. You will never have to explain your verdict to anyone.

It is your duty as jurors to consult with one another and to deliberate in an effort to reach agreement if you can do so. Each of you must decide the case for yourself, but only after an impartial consideration of the evidence in the case with your fellow jurors. In the course of your deliberations, do not hesitate to re-examine your own views and change your mind if convinced that you were wrong. However, do not surrender your honest conviction as to the weight or effect of the evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

Remember at all times, you are judges—judges of the facts. Your sole interest is to seek the truth from the evidence in the case, to decide whether the government has proved each defendant guilty beyond a reasonable doubt.

Upon retiring to the jury room you should first select one of your number to act as your foreperson who will preside over your deliberations and will be your spokesperson here in court. A verdict form has been prepared for your convenience. [Explain the verdict form.]

You will take the verdict form to the jury room and when you have reached unanimous agreement as to your verdict, you will have your foreperson fill it in, date and sign it, and then return to the courtrom.

If, during your deliberations, you should desire to communicate with me, the foreperson should write your message or question, sign it, and pass the note to the court security officer who will bring it to my attention. I will then respond as promptly as possible, either in writing or by having you returned to the courtroom so that I can address you orally. I caution you, however, with regard to any message or question you might send, that you should never reveal to any person, not even the court, how the jury stands, numerically or otherwise, on any count of the indictment, until after you have reached a unanimous verdict.

In deliberating on and arriving at a verdict, you should give this case the same careful and deliberate consideration you would give to any other serious and important matter in life, and the verdict you return should be one which completely satisfied your mind and conscience that to the very best of your ability you have interpreted the facts and have applied the law truly, correctly, and impartially.

Lake Charles, La.
March 14, 1995

/s/ James T. Trimble, Jr.
JAMES T. TRIMBLE, JR.
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

(Title Omited)

VERDICT FORM

1. As to the charge of first degree murder, we unanimously find that DEBRA FAYE LEWIS is

——— NOT GUILTY

—✔— GUILTY

If your verdict is NOT GUILTY, or you were unable to reach a verdict, please go to 1a below. If your verdict is GUILTY, you are finished. Sign and date the form.

1a. As to the lesser included offense of second degree murder, we unanimously find the defendant DEBRA FAYE LEWIS is

——— NOT GUILTY

——— GUILTY

If you considered the lesser included offense of second degree murder in 1a and your verdict was NOT GUILTY, or you were unable to reach a verdict, please go to 1b below. If the verdict as to second degree murder is GUILTY, you are finished. Sign and date the form.

1b. As to the lesser included offense of manslaughter, we unanimously find that DEBRA FAYE LEWIS is

——— NOT GUILTY

——— GUILTY

If you found the defendant guilty of manslaughter, go to the next question.

1c. Having found the defendant guilty of manslaughter, do you find that the defendant committed the offense upon a passion or in the heat of blood caused by provocation?

——— NO

——— YES

If you found that the defendant committed manslaughter in the heat of blood, the foreperson should sign and date the form. If the answer to 1c was NO, go to 1d.

1d. Having found the defendant guilty of manslaughter, did the defendant commit the offense during the commission of a felony or an intentional misdemeanor?

——— NO

——— YES

Lake Charles, Louisiana

March 14, 1995

/s/ Jimmie Guillot
Foreperson

(109)

JURY

CASE NUMBER: CR94-20001-01/02

DIVISION: Lake Charles

JUDGE PRESIDING: Trimble

EMPANELED: 03-06-95 RELEASED:

ONE	TWO	THREE	FOUR	FIVE	SIX	SEVEN
77. Vernon E. Coles 351	17. Elda Marie Fulton	13. Tracy L. Morgan	6. Clifton L. Morris, Sr.	58. Johnny Lee Cormier	9, Rachel Cormie Barrow	21, Paula F Mayo
Welsh 25 Mi	Welsh 30 Mi	Kinder 40 mi.	Cameron 65 Mi	Welsh 30 Mi	DeQuincy 40 Mi	L.C. 1 Mi

EIGHT	NINE	TEN	ELEVEN	TWELVE	1st ALTERNATE	2nd ALTERNATE
71. Jimmie A. Guillot J.A.-L.C.	1. L. J. Bass, sr.	62. Joseph P. Crawford	27. Paulette B. Richards	28. Donald B Dupre Jr	44. Lena Mae Fruge	29. Ronald E. Brisendine
L.C. 15 Mi	Pitkin 75 Mi	LC. 5 M.	Sulphur 20Mi	Sulphur 20Mi	Jennings 36 Mi	Sulphur 17 Mi

3rd Alternate
70. William

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

(Title Omitted)

MINUTES OF COURT

Date: August 22, 1995

X Case is called for sentencing.

Objections to the presentence report are ruled on by Written Memorandum Ruling.

In determining the particular sentence to be imposed, the court has considered the factors contained in 18 U.S.C. 3553.

Pursuant to the sentencing Reform Act of 1984, it is the judgment of the court that the defendant, DEBRA FAYE LEWIS, is hereby committed to the custody of the Bureau of Prisons to be imprisoned for life on count I of the indictment. The defendant is to be given credit for time served.

Upon release from imprisonment, the defendant shall be placed on supervised release for a term of five (5) years. While on supervised release, the defendant shall not commit another federal, state or local crime; shall not illegally possess a controlled substance; shall not comply with the standard conditions that have been adopted by this court and shall comply with the following additional conditions:

1) Report in person to the probation office as directed.

2) Shall not possess a firearm, destructive device, or illegal substance.

3) Shall participate in substance abuse treatment and/or mental health counseling/treatment as directed by the U.S. Probation Office to include urinalysis, at the defendant's cost.

4) Shall maintain employment and shall perform a minimum of 200 hours of community service during the first 24 months of supervised release. While not employed, the defendant shall perform forty hours of community service per week as directed by Probation.

Upon beginning supervised release, the Probation Department shall supply the defendant with a written statement that sets forth the conditions to which the term of supervised release is subject, and that is sufficiently clear and specific to serve as a guide for the defendant's conduct and for such supervision as is required.

The court finds that the defendant does not have the ability to pay a fine.

The defendant is to pay the standard assessment of $50.00 on count I to the Crime Victim Fund immediately.

The defendant is advised by the court of her right to appeal.

The defendant is remanded to the custody of the U.S. Marshal to begin service of this sentence. The court recommends incarceration at a facility that meets the Bureau of Prison's security requirements that is nearest to Pensacola, Florida.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA

(Title Omitted)

JUDGMENT IN A CRIMINAL CASE

(For Offenses Committed On or After November 1, 1987)

The defendant, DEBRA FAYE LEWIS, was represented by Frank Granger.

The defendant was found guilty on count(s) I of a one count indictment after a plea of not guilty. Accordingly, the defendant is adjudged guilty of such count(s), involving the following offense(s):

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18 USC 7, 13 & 2 LA. R.S. 14:30(A)(5)	First Degree Murder	12/20/93	1

As pronounced on August 22, 1995, the defendant is sentenced as provided in pages 2 through 4 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the United States a special assessment of $50.00, for count(s) I, which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Signed this the 22nd day of August, 1995.

/s/ James T. Trimble, Jr.
United States District Judge

Defendant's SSAN: 470-84-6936
Defendant's Date of Birth: 02/07/61
Defendant's address: 1400 East Ninth Avenue;
Florala, AL

Judgment Entered August 23, 1995

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of the defendant's life.

The defendant is to be given credit for time served.

The court recommends that the defendant be incarcerated at a facility that satisfies the Bureau of Prison's security recommendations, nearest to Pensacola, Florida.

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this Judgment as follows:

Defendant delivered on _____ to _____ at _____, with a certified copy of this Judgment.

_____
United States Marshal

By _____
Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 5 years.

While on supervised release, the defendant shall not commit another federal, state, or local crime; shall not illegally possess a controlled substance; shall comply with the standard conditions that have been adopted by this court (set forth below); and shall comply with the following additional conditions:

1. Report in person to the probation office as directed.
2. The defendant shall not own or possess a firearm, destructive device, or illegal substance.

3. The defendant shall participate in substance abuse and/or mental health counseling/treatment as directed by the U.S. Probation to include urinalysis, at the defendant's cost.

4. The defendant shall maintain employment and shall perform a minimum of 200 hours of community service during the first 24 months of supervised release. While not employed, the defendant shall perform 40 hours of community service per week as directed by Probation.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this Judgment:

1) The defendant shall not leave the judicial district without the permission of the court or probation officer.

2) The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month.

3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.

4) The defendant shall support his or her dependents and meet other family responsibilities.

5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.

6) The defendant shall notify the probation officer within seventy-two hours of any change in residence or employment.

7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute or administer any narcotic or other controlled substance, or any paraphernalia related to such substances.

8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.

9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.

10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.

11) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.

12) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.

13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or per-

sonal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

STATEMENT OF REASONS

The court adopts the factual findings and guideline application in the presentence report except as noted in the attached Memorandum Ruling.

Guideline Range Determined by the Court:

Total Offense Level:	45
Criminal History Category:	1
Imprisonment Range:	life
Supervised Release Range:	3 to 5 years
Fine Range:	$25,000 to $1,000,000
Restitution:	$ n/a

The fine is waived or is below the guideline range because of the defendant's inability to pay.

The sentence is within the guideline range, that range exceeds 24 months, and the sentence imposed for the following reasons: Severity of offense.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

(Title Omitted)

MEMORANDUM RULING

Presently before the court are the defendant's, Debra Faye Lewis's objections to the presentence report which was prepared by the Probation Department.

In the first, second, and fourth objections the defendant objects to certain factual information which was contained in the presentence report, particularly the categorization of trial testimony. This court presided over the trial of this defendant and is very familiar with the testimony brought forth. The Presentence Report ("PSR") generally bears sufficient indicia of reliability to be considered as evidence by the court in resolving factual disputes. *U.S. v. Valencia*, 44 F.3d 269 (5th Cir.(La.) Jan. 26, 1995) (No. 94-40063). It is proper for the district court to rely upon the PSR's construction of evidence to resolve a factual dispute, rather than relying on the defendant's version of the facts. *U.S. v. Montoya-Ortiz*, 7 F.3d 1171 (5th Cir.(Tex.) Nov. 12, 1993) (No. 92-8204), citing *U.S. v. Robins*, 978 F.2d 881, 889 (5th Cir.(Tex.) Nov. 20, 1992) (No. 91-1850). Thus, the court, based upon its own recollection as well as the facts recited in the PSR, specifically adopts the facts as stated therein.

The third objection concerns the assignment of two additional points for a vulnerable victim. The defendant argues that such a victim related adjustment, U.S.S.G. § 3A1.1, is inappropriate because the Louisiana statute under which the defendants were charged required the victim to be under 12 years of age. The defendant is correct

that a condition that occurs as a necessary prerequisite to the commission of a crime cannot constitute an enhancing factor under the "vulnerable victim" enhancement provision of the sentencing guidelines; the vulnerability of that provision must be "unusual" vulnerability which is present only in some victims of that type of crime. *U.S. v. Moree*, 897 F.2d 1329 (5th Cir. (Miss.) March 29, 1990) (No. 89-4204); U.S.S.G. § 3A1.1; *U.S. v. Rowe*, 999 F.2d 14 (1st Cir. (Mass.) Jul 22, 1993) (No. 92-1959) (must show individual circumstances); *U.S. v. Morrill*, 984 F.2d 1136 (11th Cir. (Ga.) Feb 16, 1993) (No. 91-8386) (victim must possess unique characteristics which make him or her more vulnerable or susceptible); *U.S. v. Davis*, 967 F.2d 516 (11th Cir. (Ala.) Aug. 3, 1992) (No. 90-7108) (circumstance, as well as immutable characteristics, can render a victim unusually vulnerable). In *U.S. v. Peters*, 962 F.2d 1410, 1417 (9th Cir. (Cal.) Feb 7, 1992) (No. 91-50097, 91-50133), the court held that "vulnerability" includes not just age, but other characteristic of the victim, including the victim's reaction to the criminal conduct and the circumstances surrounding the act.

In the case at bar, to be prosecuted under the Louisiana state law, the victim had to be under age twelve. The vulnerability component of the Sentencing Guideline, however, incorporates more than mere age. This court agrees with Probation that the victim in this case was certainly vulnerable. The facts of the case show that the victim was left in the control of a step-mother who obviously was not fond of the little girl. Because the victim's father was in the military, the child was removed from other family members who may have noticed the signs of abuse, particularly the grandmother who was particularly close to the little girl. The pattern of abuse was repeated and the child had no way of escape. She was trapped in a situation with two people who she should have been able to trust, yet who systematic beat her to death. The defendant's own statement, although not produced in its entirety for the jury, indicated that she called the child out of her room repeatedly the night of her death so that her father could beat her. If any victim is "vulnerable" it was the four year old victim in this case. The defendant's objection is OVERRULED.

Lake Charles, Louisiana, this 22nd day of August, 1995.

/s/ James T. Trimble, Jr.
JAMES T. TRIMBLE, JR.
United States District Court

Conditions of Probation and Supervised Release

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA

Docket No. 94-20001-01

Name James M. Lewis

Address 208 Oglesby Ave.
Crestview, FL 32536

Under the terms of your sentence, you have been placed on supervised release by the Honorable James T. Trimble, Jr., United States District Judge for the District of Western Louisiana. Your term of supervision is for a period of five (5) years, commencing upon release from incarceration.

While on supervised release, you shall not commit another Federal, state, or local crime and shall not illegally possess a controlled substance. Revocation of probation and supervised release is mandatory for possession of a controlled substance.

CHECK IF APPROPRIATE:

☐ As a condition of supervision, you are instructed to pay a fine in the amount of ————; it shall be paid in the following manner ————— .

☐ As a condition of supervision, you are instructed to pay restitution in the amount of ———; to ————; it shall be paid in the following manner ————— .

☒ The defendant shall not possess a firearm or destructive device. Probation must be revoked for possession of a firearm.

☒ The Defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

It is the order of the Court that you shall comply with the following conditions:

(1) You shall not leave the judicial district without permission of the court or probation officer;

(2) You shall report to the probation officer as directed by the court or probation officer, and shall submit a truthful and complete written report within the first five days of each month;

(3) You shall answer truthfully all inquires by the probation officer and follow the instructions of the probation officer;

[From the Certified Record (Transcript of Proceedings of March 27, 1987), pp. 3-11.]

[3] August 22, 1995

(PROCEEDINGS.)

THE COURT: All right. Court will come to order.

MR. REGAN: Good morning, Your Honor. In the matter of United States of America versus James Lewis, Docket Number 94-20001-01, and Debra Faye Lewis, 94-20001-02. The matter is before this court this morning for sentencing. Both defendants are present. Mr. Homer Singleton had represented James Lewis during the trial of this matter. However, he has withdrawn. Ms. Rebecca Hudsmith, the public defender for the western district of Louisiana now represents Mr. Lewis. And Mrs. Lewis is represented by Frank Granger, her counsel at trial. Would you all please come up. Do you want both at the same time, Your Honor?

THE COURT: Well, I guess we have to do them—well, I don't know. The offense is the same so I guess we could probably do them both together.

MR. REGAN: Would you all please come up?

MR. GRANGER: I had no objection to that.

THE COURT: Yeah.

MR. REGAN: Your Honor, also, for the purposes of the record, appearances this morning for the government will be myself and Mr. Michael D. Skinner, the U.S. [4] attorney.

MR. SKINNER: Good morning, Your Honor.

THE COURT: Good morning, Mr. Skinner. Glad to have you with us.

MR. SKINNER: Thank you.

THE COURT: All right. In the case of Mrs. Debra Faye Lewis, there was an objection, or there were objections filed which have been ruled on in a written memorandum ruling, copies of which have been given to counsel.

And the court will file the original in the record at this time. All right. Mr. Lewis, have you read the presentence report prepared by the probation office?

MR. LEWIS: Yes, sir.

THE COURT: And have you discussed it with your attorney, Ms. Hudsmith?

MR. LEWIS: Yes, sir.

THE COURT: Are you satisfied with the representation Ms. Hudsmith has furnished you in this matter?

MR. LEWIS: Yes, sir.

THE COURT: Mrs. Lewis, have you read the presentence report prepared by probation?

MRS. LEWIS: Yes, sir.

THE COURT: Have You discussed it with Mr. Granger?

[5] MRS. LEWIS: Yes, sir.

THE COURT: Are you satisfied with the representation Mr. Granger has furnished you in this matter?

MRS. LEWIS: Yes, sir.

THE COURT: All right. At this time, the court would recognize first Ms. Hudsmith and Mr. Lewis, if they have anything they would like to say before the court pronounces sentence?

Ms. HUDSMITH: Thank you, Your Honor. I will speak very briefly for Mr. Lewis, who on the advice of counsel will say nothing to the court at this time. He and I have reviewed the presentence report, recognizing that prior to the date that I was appointed, he was represented by Mr. Singleton, who also reviewed the report and noted for the record that there were no objections to it. I would simply state for the record that Mr. Lewis stands by his trial testimony at this time, and would say nothing further with regard to the facts of the case or the sentence. He understands, as I have explained to him, having gone over both the report and the federal sentencing guidelines that his case is one for which he faces a life sentence. And it is simply an unavoidable sentence the court must impose today. And he recognizes that and so with that in mind,

with that understanding, we would have nothing further to say at this time, Your Honor.

[6] THE COURT: All right. Mr. Granger, would either you or Mrs. Lewis like to say anything?

MR. GRANGER: I think she might want to make a brief comment or two.

MRS. LEWIS: I would just like to say that by me being so scared of Lewis, Matthew and Jadasha, I lost all four of my, I am going to lose all four of my children. I would just like to apologize to my children for being taken away from me, and say that I am sorry because I am not a murderer. I was negligent, but I am not a murderer. I would just like to say I am sorry.

MR. GRANGER: You Honor, with respect for Mrs. Lewis, Mrs. Lewis also stands by her trial testimony. When asked the question by Ms. Boutte whether she accepted responsibility, she said unequivocally, no, I did not do it. And there is nothing else we can say. She understands that under the sentencing guidelines she is going to get a life sentence, and for which you know she will exercise her right of appeal. So we are ready to proceed.

THE COURT: All right.

MS. HUDSMITH: You Honor, I don't know if it would be appropriate to say so at this time, but I have spoken with Mr. Lewis about the possibility of asking the court if he could, in sentencing him, recommend that he be placed in a prison as close as possible to his family who [7] are located in the Pensacola, Florida area. And I have reviewed with him the list of Federal prisons. It is not entirely clear to me which one he would be available to be placed in given the various levels of security.

THE COURT: Yeah.

MS. HUDSMITH: And that may be something that neither you or I are in a position to even attempt to figure out.

THE COURT: Well, I would have no problem recommending that he be placed, incarcerated at the facility nearest Pensacola that provide the necessary security.

MS. HUDSMITH: Thank you, Your Honor.

MR. GRANGER: Your Honor, the same thing for Mrs. Lewis. She is basically from the same area. I think they live thirty miles apart. She lived in Florala, Alabama, and he lived in Florida. That is the same area.

THE COURT: Pensacola.

MR. GRANGER: It is around that area, Your Honor. It is in the panhandle of Florida, in that small part of Alabama.

THE COURT: Sure.

MR. GRANGER: And she understands that it also depends on the security level where she has to go.

THE COURT: Okay. The sentences are exactly the same. So I will just say it one time. And it [8] will apply to both of them. Let me just say I know that both defendants maintained their innocence throughout the trial of this case. The jury heard all the testimony, viewed the exhibits and reached a unanimous verdict. I don't recall that, considering the seriousness of the charges, that they took an inordinate amount of time reaching their decision. And I don't know, I can't remember when I have been so moved in any case as when certainly the exhibits were introduced into evidence, and it was apparent from the photographs of the victim in this case, the type of treatment and suffering that she must have endured. And sentencing is never a pleasure for me. It is a duty that goes with the job. But as far as this court is concerned, there seems to be far too much emphasis in the media, and sometimes I feel in the profession of law itself, almost a total preoccupation with the rights of the defendants, and those who not only have been defendants, but who are convicted of offenses, and certainly their rights should be considered, and it is important in our system of justice that nobody who is innocent be convicted of an offense that they did not, in fact, commit. But I will say that a neglected element in the process are the victims. Certain victims are imposed on more than others, and the victim in this case, there is where my concern is. And I don't enjoy doing what I have to do.

But in view of what the defendants [9] in this case have been found guilty of, it is not particularly painful for me to pronounce the sentence that the court is directed to pronounce under the sentencing guidelines. This court, in determining a particular sentence to be imposed has considered the factors contained in 18 United States Code, section 3553. Pursuant to the Sentencing Reform Act of 1984, it is the judgment of this court that the defendant, James M. Lewis, and the defendant, Debra Faye Lewis be sentenced to be incarcerated for life on Count One of the indictment. Upon release from incarceration, both defendants shall be subject to supervised release for a term of five years. While on supervised release the defendants shall not commit another State, Federal or local crime; shall not illegally possess a controlled substance; shall comply with the standard conditions that have been adopted by this court and shall comply with the following additional conditions. Report in person to the probation office as directed; shall not possess a firearm, destructive device or illegal substance; shall participate in substance abuse and/or mental health counseling and/or treatment as directed by the U.S. Probation Office at the defendant's cost; shall maintain employment and shall perform a minimum of two hundred hours of community service during the first twenty-four months of supervised release. While not employed, the defendant, each [10] defendant, shall perform forty hours of community service per week as directed by probation. Upon beginning supervised release the probation department shall supply each defendant with a written statement which sets forth the conditions to which the term of supervised release is subject and that is sufficiently clear and specific to serve as a guide for the defendant's conduct, and for such supervision as is required. Violation of the terms of supervised release may result in a recommitment in prison. The court finds that neither defendant has the ability to pay a fine, and no fine is assessed. Each defendant is to pay the standard

fifty dollar assesment to the Crime Victim Fund immediately. Each defendant is reminded that he or she may have the right to appeal. The court recommends that the defendants be incarcerated at a facility that satisfies the Bureau of Prisons security requirements nearest to Pensacola, Florida. Anything further?

MR. GRANGER: No, sir.

MS. HUDSMITH: No, sir.

THE COURT: All right. That's it. Court is adjourned until tomorow. Oh yeah, it is with the understanding that any time they have served in Federal custody to the extent it can benefit them, they will be given credit for that by the Bureau of Prisons. All right. It is ordered they be remanded to the custody of the marshal [11] now to begin service of their sentence. It is ordered they be remanded at this time to the custody of the marshal for transfer to the Bureau of Prisons for service of their sentence.

MR. REGAN: Thank you, Your Honor.

(Proceedings closed. Court adjourned.)

Condition of Probation and Supervised Release

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA

—Docket No. 94-2001-02

Name Debra F. Lewis

Address 1400 E. 9th Avenue
Florala, AL 3644

Under the terms of your sentence, you have been placed on supervised release by the Honorable James T. Trimble, Jr., United States District Judge for the District of Western Louisiana. Your term of supervision is for a period of five (5) years commencing upon release from incarceration.

While on supervised release, you shall not commit another Federal, state, or local crime and shall not illegally possess a controlled substance. Revocation of probation and supervised release is mandatory for possession of a controlled substance.

CHECK IF APPROPRIATE:

☐ As a condition of supervision, you are instructed to pay a fine in the amount of ————; it shall be paid in the following manner ————————————.

☐ As a condition of supervision, you are instructed to pay restitution in the amount of ——— to ————; it shall be paid in the following manner ————.

☒ The defendant shall not possess a firearm or destructive device. Probation must be revoked for possession of a firearm.

☒ The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

It is the order of the Court that you shall comply with the following standard conditions:

(1) You shall not leave the judicial district without permission of the court or probation officer;

(2) You shall report to the probation officer as directed by the court or probation officer, and shall submit a truthful and complete written report within the first five days of each month;

(3) You shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

(Title Omitted)

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that DEBRA FAYE LEWIS, defendant herein, hereby appeals to the United States Court of Appeal for the Fifth Circuit from the judgment of the District Court rendered on August 22, 1995.

Lake Charles, Calcasieu Parish, Louisiana, this 25th day of August, 1995.

Respectfully submitted,

FRANK GRANGER
A Professional Law Corporation

/s/ Frank Granger
FRANK GRANGER,
LSBA No. 06219
203 West Clarence Street
Lake Charles, Louisiana, 70601
(318) 439-2732

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-30860

D.C. Docket No. 94-CR-20001-01

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
versus

DEBRA FAYE LEWIS,
Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Louisiana

Before JOLLY, DUHÉ, and STEWART, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the conviction and sentence of the district court in this cause is affirmed.

As Mandate: Sep. 24, 1996

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 95-30860

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JAMES M. LEWIS; DEBRA FAYE LEWIS,
Defendants-Appellants.

Appeal from the United States District Court
for the Western District of Louisiana

Aug. 19, 1996

Rehearing and Suggestion for Rehearing
En Banc Denied Sept. 16, 1996

Before JOLLY, DUHÉ, and STEWART, Circuit Judges.

STEWART, Circuit Judge:

James M. Lewis and Debra Faye Lewis appeal their convictions for first degree murder under Louisiana law pursuant to the Assimilative Crimes Act. Because the federal murder statute and sentencing guidelines occupy the area of the law, they contend that the district court erred in refusing to dismiss their indictments. They also

challenge the sufficiency of the evidence as well as evidentiary rulings made by the district court. Additionally, Debra Lewis argues that Battered Women's Syndrome diminished her capacity to form a specific intent to kill or inflict great bodily harm or to aid and abet James Lewis. For the following reasons, we reverse the district court's ruling regarding the indictments but affirm the defendants' convictions and sentences.

FACTS

James Lewis and his wife, Debra Lewis, were arrested for the beating death of four-year-old Jadasha D. Lowery, the biological daughter of James Lewis and Stacy Lowery. The death occurred on the military reservation at Fort Polk in Vernon Parish, Louisiana, where Mr. Lewis was stationed with the United States Army.[1]

On the day of her death, Jadasha was subjected to severe beatings, which resulted in several contusions and bruises on her scalp and which caused massive bruising over her entire body. The body bruises caused hemorrhages beneath the skin that redirected one-third to two-thirds of her entire blood volume from her circulatory system and into the tissues surounding the injuries. The head injuries caused Jadasha to suffer cerebral edema,[2] which was identified as the cause of her death. The indictment charged the Lewises with first degree murder under Louisiana law through the Assimilative Crimes Act.[3] After receiving guilty verdicts, both Lewises were sentenced to life imprisonment. The Lewises appealed.

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[1] Fort Polk, a United States military reservation, is a federal enclave as defined in 18 U.S.C. § 7.

[2] Cerebral edema is a condition in which the brain swells and presses on the brain stem and which eventually causes respiratory function to cease.

[3] The indictment provides as follows:

> That on or about the 20th day of December, 1993, at Fort Polk, Louisiana, in the Western District of Louisiana, upon lands

DISCUSSION

A. ASSIMILATIVE CRIMES ACT.

The Lewises argue that the indictment under which they were charged is defective because it improperly charges them under La.Rev.Stat. 14:30A(5) when 18 U.S.C. § 1111 criminalizes the same conduct. Mr. Lewis aserts that first degree murder of a person under the age of twelve under the Louisiana statute is comparable to second degree murder under section 1111, with the minor age of the victim causing punishment to be enhanced under the sentencing guidelines. Mrs. Lewis contends that the government was statute "shopping" when it charged them under Louisana law in order to obtain a lesser standard of proof and the benefit of more severe penalties in the event the jury returned verdicts on lesser included offenses.

Our examination of the Lewises' indictment requires us to analyze Assimilative Crimes Act. Interpretations of statutes receive de novo review. *Estate of Moore v. C.I.R.*, 53 F.3d 712, 714 (5th Cir.1995), Similarly, review of a district court's conclusion that an indictment is sufficient is reviewed under the de novo standard. *United States v. Green*, 964 F.2d 365, 372 (5th Cir.1992), *cert. denied*, 506 U.S. 1055, 113 S.Ct. 984, 122 L.Ed.2d 137 (1993). After evaluating the language of the ACA, Supreme Court precedent, and other federal jurisprudence,

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acquired for the use of the United States and under the exclusive jurisdiction thereof, JAMES M. LEWIS and DEBRA FAYE LEWIS, defendants herein, each knowingly and willfully aided and abetted, one by the other, did, with specific intent to inflict great bodily harm, commit first degree murder of Jadasha D. Lowery, a human being under the age of twelve years, in violation of Title 14 Louisiana Revised Statutes Annotated, Section 30(5), [Amended March 6, 1996 to 30(A)(5)], all in violation of Title 18, United States Code, Sections 7, 13, and 2. [18 U.S.C. §§ 7, 13, & 2; La. R.S. 14:30(5)].

we are compelled to conclude that the Lewises' indictment is invalid.

The ACA makes punishable crimes occurring on federal enclaves although Congress has not expressly addressed the conduct in the federal statutes. The ACA provides:

> Whoever within or upon any of the places now existing or hereafter reserved or acquired as provided in section 7 of this title, is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the state . . . in which such place is situated, by the laws thereof in force at the time of such act or ommission, shall be guilty of a like offense and subject to like punishment.

18 U.S.C. § 13. Through the ACA the government may use state statutes to prosecute offenders on federal enclaves "only if no act of Congress directly makes the offender's conduct punishable." *United States v. Brown*, 608 F.2d 551, 553 (5th Cir.1986). The ACA fills in gaps existing in federal statutes regarding criminal law. *Id.* However, where Congress has enacted legislation criminalizing conduct on the enclaves, the federal statutes preempt the state laws regarding those crimes. *United States v. Sharpnack*, 355 U.S. 286, 291, 78 S.Ct. 291, 294-95, 2 L.Ed.2d 282 (1958).

The Supreme Court shed light on the limitations of the ACA in *Williams v. United States*, 327 U.S. 711, 66 S.Ct. 778, 90 L.Ed. 962 (1946). In *Williams*, the Court reversed the conviction of a white married man convicted under the Arizona statutory rape law pursuant to the ACA for having sex wilth a seventeen-year-old Indian girl on an Indian reservation. 327 U.S. at 725, 66 S.Ct. at 785. The federal statutes punished carnal knowledge of a minor girl when the victim was under the age of

sixteen, whereas the Arizona statute punished the same conduct when the victim was under the age of eighteen. The Arizona statute provided a harsher penalty than the federal statute. *Id.* at 717, 66 S.Ct. at 781. Interpreting the language existing in the ACA at the time, the Court concluded that the precise acts of the defendant were made criminal under federal statutes addressing adultery or fornication as well as carnal knowledge, and the government could not enlarge the definiton of the federal carnal knowledge crime by incorporating the state statutory rape statute through the ACA. *Id.* at 717-18, 66 S.Ct. at 781-82. The Court further noted that the ACA "has a natural place to fill through its supplementation of the Federal Criminal Code, without giving it the added effect of modifying or repealing existing provisions of the Federal Code." *Id.* at 718, 66 S.Ct. at 782. The language of the ACA referred "in a generic sense" to "acts of a general type or kind." *Id.* at 722, 66 S.Ct. at 784. The Court held that in Williams' case "not only has the generic act been covered by the [federal] definition of having carnal knowledge, but the specific acts have been made 'penal' by the [federal] definition of adultery." *Id.* at 723, 66 S.Ct. at 784.

This court, like the majority of the other circuits,[4] has interpreted *Williams* as establishing a "precise acts" test

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[4] The circuit split following *Williams* is well recognized. *See, e.g., United States v. Broadnax*, 688 F.Supp. 1080, 1081-82 (E.D.Va. 1988); and *United States v. Smith*, 614 F.Supp. 454, 460 (D.Me. 1985), *vacated in part on other grounds, United States v. Mariea*, 795 F.2d 1094 (1st Cir.1986). The majority view holds that the ACA does not apply when the "precise act" prohibited by the state statute is defined and prohibited by the federal statute. *See generally, United States v. Johnson*, 967 F.2d 1431 (10th Cir.1992), *cert. denied*, 506 U.S. 1082, 113 S.Ct. 1053, 122 L.Ed.2d 360 (1993); *United States v. Sasnett*, 925 F.2d 392 (11th Cir.1991); *United States v. Griffith*, 864 F.2d 421 (6th Cir.1988), *cert. denied*, 490 U.S. 1111, 109 S.Ct. 3167, 104 L.Ed.2d 1029 (1989); *United States v. Kaufman*, 862 F.2d 236 (9th Cir.1988); and *Fields v. United States*, 438 F.2d 205 (2d Cir.), *cert. denied*, 403 U.S. 907, 91 S.Ct. 2214, 29 L.Ed.2d 684 (1971). *Compare* the minority view holding that the ACA does not apply when the federal statute punishes the "generic conduct" covered in the statute. *United States v. Butler*, 541 F.2d 730 (8th Cir.1976).

regarding the applicability of the ACA. *See United States v. Brown*, 608 F.2d 551, 554 (5th Cir.1979). In *Brown*, the court held that the government could prosecute the defendant under the Texas child abuse statute even though injury to a child could be punishable under the federal assault statute because the precise act of injury to a child was not proscribed by federal law and the state statute was designed to punish specific conduct of a different character than the conduct proscribed by the federal assault statute. Mrs. Brown was charged with injuring her husband's biological two-year-old son, whom she struck on the head with a blunt, flat instrument. Though surgery revealed a subdural hematoma covering the left side of his brain, the child survived. The court in *Brown* rejected arguments that use of the child abuse statute enlarged the scope of the federal offense. It found the child abuse and assault statutes different because of the nature of the offense being punished. The court relied on the Second Circuit case, *Fields v. United States*, 438 F.2d 205 (2d Cir.1971), to demonstrate that child abuse is a different type of assault than the conduct covered under the federal assault statute.

Similarly, in *United States v. Fesler*, 781 F.2d 384, 391 (5th Cir.1986), the court clarified that the federal statute and the state statute must involve different elements and must seek to punish different conduct. In *Fesler*, the Feslers were charged with murder under the federal statute and causing serious bodily injury under the Texas child abuse statute for the scalding death of their ten-month-old daughter whom they deliberately dipped in scalding water. The defendants alleged that the indictment violated the ACA. The court held that because the statutes covered

different "precise acts," no violation had occurred. *Id.* at 391. The court noted that death of a human being, essential for the manslaughter conviction, was unnecessary for the child abuse conviction. The court further explained that "[i]t is important that the state statute seeks to punish a particular offense at which the federal statute is not aimed, child abuse." *Id.* Accordingly, the court upheld application of the ACA in this context.

This court consistently has found that child abuse constitutes a different "precise act" which the government may charge in addition to murder under the federal statute. *See United States v. Webb*, 796 F.2d 60, 62 (5th Cir. 1986), *cert. denied*, 479 U.S. 1038, 107 S.Ct. 894, 93 L.Ed.2d 846 (1987) (convicted of second degree murder under the federal statute and injury to a child under the state statute for the death of a six-year-old boy whose head was slammed against a wall and who was scalded). Federal jurisprudence demonstrates that the different nature of the "act" regarding child abuse does not eliminate the need for seeking punishment for murder under the federal statute when the abuse results in death. *See United States v. Phillip*, 948 F.2d 241, 245 (6th Cir.1991), *cert. denied*, 504 U.S. 930, 112 S.Ct. 1994, 118 L.Ed.2d 590 (1992) (the defendant was charged with second degree murder under the federal statute and committing and permitting child abuse under the Kentucky child abuse statute); and *United States v. Harris*, 661 F.2d 138, 139 (10th Cir. 1981) (the defendant was charged with murder under the federal statute and the Wyoming child abuse statute). Indeed, where conviction under the state statute was allowed, the state child abuse statute was alleged in addition to murder under the federal statute, rather than in place of it.

Herein lies the distinction between the present case and *Brown* and *Fesler*. The government in the present case has entirely usurped the federal murder statute with "gap-filling" state law. The government uses the precise acts test as reasoned in *Brown* and *Fesler* to argue that it may use

the state murder statute although the federal statute already punishes murder. We find that the precise acts test cannot save this indictment.

The "precise act" sought to be punished under 18 U.S.C. § 1111 and La.Rev.Stat. § 14:30A(5) for murder of a victim under twelve [5] is the intentional killing of a human being (i.e., "murder"). This is the conduct clearly identified in both statutes. Murder is punishable under both the state and federal statutes though they define and punish the conduct differently. Section 1111 provides the following definition of murder: "Murder is the unlawful killing of a human being with malice aforethought." The section then delineates the elements needed for first degree murder and second degree murder:

> Every murder perpetrated by [1] poison, [2] lying in wait, or [3] any other kind of willful, deliberate, malicious, and premeditated killing; or [4] committed in the perpetration of, or attempt to perpetrate, any arson, rape, burglary, or robbery; or [5] perpetrated from premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed, is murder in the first degree.
>
> Any other murder is murder in the second degree.

Section 14:30A(5) of the Louisiana Revised Statutes in pertinent part provides:

> A. First degree murder is the killing of a human being.
>
> . . . .
>
> (5) When the offender has specific intent to kill or to inflict great bodily harm upon a victim under the age of twelve or sixty-five years of age or older.

The varying definitions affect the degree of the crime and the level of punishment. "Murder of a child" does not

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[5] Hereinafter we refer to the crime of "murder of a victim under twelve" as "murder of a child" or "child murder."

constitute a different act of murder omitted from the federal murder statute. That Louisiana chose to define first degree murder regarding children differently than Congress defines it does not automatically make murdering a child a different or even a more specific act.

The government attempts to show that the state's concern for child abuse prompted the specific reference to "victims under the age of twelve" in the first degree murder statute. We conclude that the government exaggerates the significance of the inclusion of the child murder provision in the child abuse reasoning set forth in *Brown* and *Fesler*. The Louisiana legislature placed child murder in the first degree murder statute to deter crimes against these vulnerable members of society and to ensure that if a child is murdered the offender is guaranteed to receive a certain sentence.[6] This reasoning explains the placement of all acts listed in the Louisiana first degree murder provision as well as the reasoning underlying the enumerated crimes qualifying for first degree murder under the federal statute. The lists in both statutes define what raises a particular homicide to the grade of first degree murder under the respective systems. We reject the position taken by the government during oral argument that it used the Louisiana statute to "further define" the federal law. Further defining would create a more expansive definition of federal murder. Accordingly, to treat the murder of a child as conduct of a different nature would impermissibly enlarge the scope of the federal statute, which the Supreme Court in *Williams* instructed that we cannot do. We can-

[6] Though not reflected in the murder statute, Congress addresses the vulnerability concern in the sentencing guidelines. Section 3A1.1 of the Federal Sentencing guidelines allows a judge to increase a defendant's sentence by two levels when the victim was a child. Section 3A1.1 provides: "If the defendant knew or should have known that a victim of the offense was unusually vulnerable due to age . . . or that the victim was otherwise particularly susceptible to the criminal conduct, increase by 2 levels."

not permit the government to create the illusion of a "gap" in the law where none exists in order to enhance its ability to convict or to exact a harsher penalty.

Further, contrary to the government's suggestion, public concern regarding child abuse does not change the character of murder when a child is involved. The distinction we have recognized between assault under the federal statute and child abuse cannot transfer by analogy to create a tangible distinction between murdering an adult and murdering a child. Child abuse qualifies as a separate class of conduct because the nature of the crime spawns methods and treatments not needed in a general assault case. This is not necessarily true regarding the murder of a child. Children are murdered in many ways unrelated to child abuse. For example, if a child is shot during a robbery on a federal enclave, this conduct constitutes murder plain and simple, and this offense would not be different in natuure so as to warrant invocation of the ACA. It would be illogical to say that child murders resulting from child abuse can be charged under the state statute pursuant to the ACA whereas all other child murders must be prosecuted under the federal statute. We find that the murder of a child is not a different degree of homicide that removes it from the federal murder statute.[7]

The government's interpretation of *Brown* and the precise acts test goes too far. Its interpretation would allow the wholesale incorporation of state law via the ACA. Neither Congress nor the Supreme Court intended such a result. For ACA purposes, a precise act cannot qualify as a "specific conduct of a different character" when the conduct is covered by a federal statute and when the acts

[7] Our decision might be different if the government were prosecuting the Lewises under a Louisiana murder statute that expressly made criminal child murders resulting from child abuse. This would make the precise act criminalized under the state statute qualify as being conduct of a different nature or character.

described in the federal and state statutes differ only in name, definition, or punishment.[8] The essential nature or theory of an act made criminal by a state statute must differ substantially from the federal statute in order to elevate the conduct to a precise act.

For example, "driving under the influence manslaughter" is conduct substantially different in nature than general "manslaughter." *See United States v. Sasnett*, 925 F.2d 392 (11th Cir.1991). The theory underlying DUI manslaughter is to remove the need to prove that the drinking caused an accident. *Id.* at 396. The government need only prove that the defendant had a blood alcohol level of .10 or higher. The court in *Sasnett* allowed application of the ACA because no federal statute defined or prohibited this precise act. *See also, United States v. Jones*, 244 F.Supp. 181, 183 (S.D.N.Y.1965) (allowing application of the ACA to prosecute using the "different

[8] We note in passing that the Sixth Circuit persuasively has identified four categories of cases that arise under ACA cases: (1) all crimes criminal under the federal law are also criminal under state law, but additional conduct is criminal under state law, (2) federal law encompasses a broader area than the state law, but the state law carries harsher penalties or an easier burden of proof, (3) state and federal laws overlap to a degree, but each occupies an area of law not covered by the other, and the conduct at issue falls within the overlapped area, and (4) the laws overlap, as described in the third group; however, the conduct falls within the area in which the act is criminal under the state law but not the federal law. *See United States v. Griffith*, 864 F.2d 421, 423-24 (6th Cir.1988). The district court in the present case found that this case falls within the third category because murder of a child could be punishable as federal murder, but the Louisiana statute presents a theory essentially different from that federal statute by taking into account the compelling state interest in protecting children under the age of twelve. We disagree. We find that this case falls within the second category. The Lewises' precise conduct is prohibited by the federal statute, but the penalty is harsher under the Louisiana statute. Murder of a child carries an automatic penalty of life or death in Louisiana. As explained above, the theories underlying the two statutes are not different.

theory" of disorderly conduct under the state statute rather than the federal parading/picketing statute where the defendants chained themselves to the court entrances to prevent entry or exit).

Murder of a child as defined under the Louisiana first degree murder statute cannot clear the "substantially different" hurdle. *See Shirley v. United States*, 554 F.2d 767, 768-69 (6th Cir.1977) (ACA inapplicable though armed robbery under the state statute was more specific and more harshly punished than the federal robbery statute); and *United States v. Big Crow*, 523 F.2d 955, 958 (8th Cir.1975), *cert. denied*, 424 U.S. 920, 96 S.Ct. 1126, 47 L.Ed.2d 327 (1976) (ACA inapplicable though the state statute prohibited assault resulting in great bodily harm and provided a stiffer penalty than the federal assault statute). Accordingly, we hold that the federal murder statute preempts the Louisiana first degree murder statute and because the precise act here, killing a human being, is punishable under the federal statute and because the nature of the crime "murder of a child" does not differ substantially from the nature and theory of murder in general. The government improperly invoked the ACA to charge the Lewises under the Louisiana statute. The indictment contains an infirmity in that it references La. Rev.Stat. § 14:30A(5). We must determine whether the convictions and sentences can survive in spite of this infirmity.

B. REMEDY REGARDING FLAWED ASSIMILATION

The infirmity discussed above is not fatal to the indictment in this case. We find the infirmity to be an apparent rather than a real defect. Accordingly, though we find error in the indictment, we will uphold the Lewises' convictions unless they establish reversible error on another ground. This court has previously adopted the maxim that "[w]here the government wrongfully secures a conviction

under a state statute pursuant to the Assimilative Crimes Act, rather than under the relevant federal statute, the appropriate remedy is not reversal of the conviction, but rather a vacating of the sentence and a remand to the district court for resentencing[,]" provided that the basic elements of the crime as defined in the federal statute were proven at trial and provided that no trial errors warrant reversal of the convictions. *See United States v. Olvera*, 488 F.2d 607, 608 (5th Cir.1973), *cert. denied*, 416 U.S. 917, 94 S.Ct. 1625, 40 L.Ed.2d 119 (1974) (citing *United States v. Chaussee*, 536 F.2d 637, 644 (7th Cir. 1976) (citing *United States v. Word*, 519 F.2d 612, 618 (8th Cir.1975)). *Compare United States v. Butler*, 541 F.2d 730, 737 (8th Cir.1976) (the court discussed the applicable remedy of remanding for sentencing, but instead vacated the convictions because the government did not prove at trial the interstate commerce nexus, which was not an element of the state crime).[9]

In *Olvera*, the government conceded on appeal that the federal statute was controlling rather than the ACA and the Texas statute. 488 F.2d at 608. This court held that the "sentence must be vacated and the cause remanded for entry of a new judgment imposing sentence under the federal statute." The Ninth Circuit took a similar position in *Hockenberry v. United States*, 422 F.2d 171, 174 (9th Cir.1970). In *Hockenberry*, although the government conceded that the existence of an applicable act of Congress precluded assimilation of the California statute through the ACA, the court refused to dismiss the indictment. The indictment stated a crime against the United States even though the language of the California statute differed from the applicable federal statute. 422 F.2d at 173-74. The court reasoned that rules 7(c) and 52(a) of the Federal Rules of Criminal Procedure instruct that:

[9] When discussing the conclusions reached in *Chaussee*, the district court below acknowledged the quote regarding remand. *United States v. Lewis*, 848 F.Supp. 692, 695 n. 3 (W.D.La.1995).

> "error in the citation of the statute or its omission shall not be ground for dismissal of the indictment * * * or for reversal of a conviction if the error or omission did not mislead the defendant to his prejudice" and . . . "any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."

Id. at 174 (internal brackets omitted). After noting that the defendant did not allege prejudice or defects affecting substantial rights and then finding that the record would not support either claim, the court lacked jurisdiction to prosecute the defendant. The *Hockenberry* court affirmed the defendant's conviction but remanded the case for resentencing.[10]

Likewise, we find that remand for reindictment and retrial is not required under the circumstances of this case. The basic elements are the same for second degree murder under 18 U.S.C. § 1111(a) and first degree murder under La.Rev.Stat. § 14:30A(5). Both statutes require proof of specific intent.[11] and the killing of a human being. Re-

[10] "It is well settled [in the ACA context] that an incorrect statutory reference in an indictment does not require reversal where all of the essential elements of the correct statute are otherwise covered, but that any sentence imposed in excess of that allowed under the correct statute must be vacated and the case remanded for resentencing." *United States v. Walker*, 557 F.2d 741, 746-47 (10th Cir.1977). Several circuits that have wrestled with defective indictments containing erroneously assimilated state law have reached the same conclusion. *See, e.g., United States v. Hall*, 979 F.2d 320, 323 (3d Cir.1992); *United States v. Lavender*, 602 F.2d 639, 640-41 (4th Cir.1979); *United States v. Chaussee*, 536 F.2d 637, 644-45 (7th Cir.1976); *United States v. Word*, 519 F.2d 612, 618-19 (8th Cir.), *cert. denied*, 423 U.S. 934, 96 S.Ct. 290, 46 L.Ed.2d 265 (1975); *United States v. Patmore*, 475 F.2d 752, 753 (10th Cir. 1973); *Dunaway v. United States*, 170 F.2d 11, 12-13 (10th Cir. 1948).

[11] We reject Mrs. Lewis's arguments that the federal murder statute requires proof of "intent to kill." She says that because she and

garding intent, 18 U.S.C. § 1111 requires proof of "specific intent to inflict serious bodily injury," and La.Rev. Stat. § 14:30A(5) requires proof of "specific intent to inflict great bodily harm." The dissimilar phrasing does not destroy the compatibility existing between the statutes. This court has already acknowledged that the intent element under the federal murder statute is comparable to the intent required under the Louisiana murder statutes. *See United States v. Tolliver*, 61 F.3d 1189, 1221 (5th cir.1995), *vacated on other grounds, Sterling v. United States*, —— U.S. ——, 116 S.Ct. 900, 133 L.Ed.2d 834 (1996). In *Tolliver*, when analyzing a sentencing issue, the court agreed with the district court that the Louisiana second degree statute, under which the defendants were convicted, was most akin to the federal crime of first degree murder.

> [T]he language of the guidelines instructs the court to compare the conduct, not the titles of the statutes

her husband never intended to kill Jadasha they could not be convicted of murder under the federal statute. This circuit has indicated that malice aforethought may be inferred from circumstances which show a callous, wanton, or extremely indifferent disregard for human life. *United States v. Chagra*, 807 F.2d 398, 402 (5th Cir.1986), *cert. denied*, 484 U.S. 832, 108 S.Ct. 106, 98 L.Ed.2d 66 (1987) (after rejecting the defendant's argument that the jury instruction, which did not demand proof of an intent to kill but only demanded proof of reckless acts causing the death of another, was error, the court noted that the instruction reflected the correct definition of malice); *see also, United States v. Harrelson*, 766 F.2d 186, 189 n. 5 (5th Cir.), *cert. denied*, 474 U.S. 908, 106 S.Ct. 277, 88 L.Ed.2d 241 (1985); and *United States v. McRae*, 593 F.2d 700, 703 (5th Cir.), *cert. denied*, 444 U.S. 862, 100 S.Ct. 128, 62 L.Ed.2d 83 (1979). More importantly, this court has specifically found that malice aforethought is equivalent to an intent do serious bodily injury. *Lara v. Parole Comm'n*, 990 F.2d 839, 841 (5th Cir.1993) (explaining the three distinct mental states encompassed in malice aforethought: "(1) intent to kill; (2) *intent to do serious bodily injury*; and (3) extreme recklessness and wanton disregard for human life" [emphasis added]).

> cited. As pointed out by the district court, different states have different labels for the same crime.
>
> > [t]herefore, depending upon which state murder statute is charged as the underlying offense of "premeditated murder or killing with specific intent," inconsistent sentences for identical illegal conduct would be imposed in different states if the base offense level was computed merely by looking at the "label" of such statute and having that label be determinative of the most analogous federal offense, rather than looking at the actual substance of the underlying state statute to determine the most analogous federal offense.

The *Tolliver* court concluded that the district court had correctly compared the substance of the underlying offense and correctly found that the first degree murder was the most analogous federal offense. Though labeled somewhat differently, "intent to inflict serious bodily injury" and "intent to inflict great bodily harm" represent parallel intents for purposes of evaluating these murder statutes. Accordingly, the elements under the federal and Louisiana murder statutes are analogous enough for us to conclude that the two statutes share the same essential elements.

In the present case, the government proved the elements for federal murder at trial. The district judge instructed the jury as follows:

> in order to convict either of the defendants of First Degree Murder, you must find:
>
> 1. That said defendant killed Jadasha D. Lowery on or about December 20, 1993; and
>
> 2. That said defendant acted with specific intent to kill or inflict great bodily harm. . . .

The jury's finding that both Lewises were guilty of this crime indicates that the intent and death elements were

satisfied. Accordingly, the elements for second degree murder, which mirror the elements contained in the jury charge, were proven below.

Provided that we find below that the Lewises' convictions are not reversible due to trial error, remand for resentencing is not warranted in this case. Resentencing is only required where the district court has imposed a sentence that exceeded the maximum sentence that the defendant would have received if sentenced under the applicable federal statute. In *Hockenberry*, the court explained that resentencing was necessary because the indictment could not support the ten-year sentence Hockenbery received. 422 F.2d at 174. Though the maximum sentence under the California statute was ten years, the maximum sentence available under the federal statute was only five years. Accordingly, the court instructed the district court on remand to reduce the sentence to comport with the federal penalty.

In *United States v. Hall*, 979 F.2d 320, 323 (3d Cir. 1992), the Third Circuit refused to remand for sentencing because "the sentence imposed on Hall was not higher than that which could have been convicted under the CFR." The CFR provided punishment consisting of a fine not exceeding $500, or six months imprisonment, or both, plus costs. The district court sentenced Hall to 45 days imprisonment and a fine of $300. The *Hall* court found no prejudice and no need for remand.

Here, the Lewises did not receive a sentence exceeding the maximum sentence allowed under the federal murder statute. The United States Code makes second degree murder punishable by imprisonment "for any term of years or *for life*." 18 U.S.C. § 1111 (emphasis added). Mr. and Mrs. Lewis both received life sentences. Unlike Hockenberry, the Lewises' sentences are supported by their joint indictment. Therefore, we need to remand for resentencing.

C. CLAIMS OF TRIAL ERRORS.

Our conclusions regarding the defective, but not fatal, indictment and the appropriate remedy for the flawed assimilation do not end the discussion. We still must determine whether the convictions can stand in the face of the other trial errors alleged by the defendants. After a thorough review of the record, we find no reason to reverse the Lewises' convictions. We will, however, discuss the Lewises' specific contentions of error below.

1. *Sufficiency of the Evidence.*

Both Lewises claim that there was insufficient evidence to prove that they had specific intent to kill or inflict great bodily harm on Jadasha. Mr. Lewis claims that there is overwhelming evidence suggesting that Mrs. Lewis had a plausible motive (i.e., jeolousy) to harm Jadasha and that she delivered the murderous blows to Jadasha; whereas, the evidence merely places him on the premises on the day of the murder. Mr. Lewis lists several witnesses who testified as to Mrs. Lewis's jealousy and abuse of Jadasha. Only Mrs. Lewis and her two daughters testified that Mr. Lewis hit Jadasha. Not even they testified that he hit Jadasha on the head. Moreover, the pathologist testified that he had to dissect Jadasha's body to see the extent of the bruising, and that the visible marks cannot be characterized as "great bodily harm."

Similarly, Mrs. Lewis admits to disciplining Jadasha, but denies that the discipline resulted in significant injury. She points primarily to testimony of the pathologist in support of her insufficient evidence claim. He testified that (1) the hemorrhages and bruises on Jadasha's head would not have been visible through her scalp and hair, (2) the deep bruises evident on the pre-autopsy and autopsy photographs of Jadasha were not visible at the time she died and had to work their way to the surface of her skin, (3) the body bruises might not be visible if

Jadasha was wearing clothes, (4) there was no evidence that the brain hematomas were directly related to the contusions found on Jadasha's scalp, and (5) the contusions and deep hemorrhages were caused by objects like an adult's hand; one would not expect a fly swatter or ⅜" diameter switch [12] to inflict these injuries. Mrs. Lewis also argues that none of the many witnesses called by the government or the defendants testified that they saw Mrs. Lewis strike Jadasha or use unusual or excessively cruel discipline measures on her. She further asserts that "even though [Jadasha] died, that is not in and of itself murder."

The standard for reviewing the sufficiency of the government's evidence is whether a reasonable trier of fact could have found that the evidence established the appellant's guilt beyond a reasonable doubt. *United States v. Stedman*, 69 F.3d 737, 739 (5th Cir.1995); and *United States v. Ruggiero*, 56 F.3d 647, 654 (5th Cir.), *cert. denied*, —— U.S. ——, 116 S.Ct. 486, 133 L.Ed.2d 413 (1995). We must review the evidence in the light favorable to the guilty verdict, that is, in the light most favorable to the government. *See United States v. Tannehill*, 49 F.3d 1049, 1054 (5th Cir.), *cert. denied*, —— U.S. ——, 116 S.Ct. 167, 133 L.Ed.2d 109 (1995). Further, we must consider all reasonable inferences arising from the evidence in the light most favorable to the government. *Id.*

Under Revised Statute 14:30A(5), the government had to prove that the Lewises killed Jadasha with specific intent to kill or inflict great bodily harm upon a victim under the age of twelve. Further, the government had to satisfy its burden of proving that the Lewises were guilty beyond a reasonable doubt; proving only that the Lewises *could be guilty* is insufficient to satisfy this burden.

[12] A "switch" is a light branch from a tree or bush used to discipline by striking.

United States v. Sacerio, 952 F.2d 860, 863 (5th Cir. 1992). Because Jadasha's age and death are undisputed, we proceed to the issue of the defendants' intent.

We find that the record fully supports the defendants' convictions. Their arguments ignore the vast amount of circumstantial evidence which was sufficient to allow a jury to infer that they were guilty of murdering Jadasha. In the defendants' statements given contemporaneously with the investigation into Jadasha's death both admitted to beating Jadasha numerous times within the twenty-four hours preceding her death. Mr. Lewis shook Jadasha several times and hit her with his hand or a fly swatter, while Mrs. Lewis hit her with a fly swatter, coat hanger, and switches. Further, because they spent the day together, the Lewises were aware of the beatings administered by the other that day. A military police officer testified that soon after learning that Jadasha was dead Mr. Lewis told the military police officers "I shouldn't have done it; I shouldn't have spanked her like that." Other military police officers testified that Mrs. Lewis made spontaneous statements that "she only had to whip [Jadasha] three times that day" and "she shouldn't have hit the child. If the child would be okay, then she would not punish her again." In addition, both related a version of an incident in which Mr. Lewis was beating Jadasha, she ran in her room or was instructed to go to her room, and then Mrs. Lewis called her from the room, wherein Mr. Lewis beat Jadasha again. Further, during the ride to the correctional facility Mr. Lewis was overheard asking investigator McCormick how pleading guilty to a charge relating to homicide would affect his military career.

Testimony from a paramedic, emergency personnel, a pediatrician, and a forensic pathologist attested to outward signs that demonstrated the extent of Jadasha's injuries. Testimony indicates that flesh wounds on Jadasha "were still oozing blood" when she arrived in the emergency room. The paramedic describes a mark on

Jadasha's forehead, a swollen lip, blood matted in her hair, blood on the top of her left ear, skin missing from her left ear, and marks on her body from a fly swatter or a coat hanger. The injuries on her body were consistent with an adult's open hand, a fly swatter, a hanger, and a curtain rod.

The pediatrician's testimony corroborated the testimony of the paramedic and emergency room personnel. Additionally, he said that Jadasha's abdomen was tense, indicating the possibility of abdominal trauma. The cartilage appeared to be fractured in Jadasha's left ear. Jadasha had suffered multiple repeated trauma to her body. Moreover, the pediatrician agreed that the injuries qualified as "great serious injuries."

Similarly, the forensic pathologist's description of the crime scene showed that the blood of the slaughter remained in the house. Several blood drops appeared all over the floor of the living room and on the floor of Jadasha's room. Blood was found on pieces of a curtain rod found crumpled in the Lewises' garbage can. Dried blood spots were visible on the sofa, on the window curtail, on the closet doors in the hallway, in the master bedroom closet, and on walls. One blood spot on the wall looked like a child's smeared hand print. Blood appeared on articles of clothing and blankets. In addition to the blood spots, the pathologist found several pieces of broken twigs in Jadasha's room, two unusually thick and bulky fly swatters, which he said "didn't look like what you would think a fly swatter would look like." He also found a clump of hair that appeared to be pulled out of the scalp.

The forensic pathologist counted over two hundred injuries on Jadasha's body caused by non-accidental injury. He matched the shape of Jadasha's injuries with the weapons the Lewises admitted using to beat Jadasha. He also testified regarding the nature of the old and new wounds

covering her body. In great detail he described the raw sores, lacerations, and callouses evident on both sides of Jadasha's buttocks, which were caused from chronic, repetitive injuries. The pathologist testified that (with the exception of some areas on the buttocks, the left ear, and scars from a hot liquid burn) the injuries to Jadasha's body were inflicted within twenty-four hours of her death because there was "recent bleeding in the underlying tissue." So much blood was redirected into the tissues underlying the injuries that Jadasha's circulatory system was missing one-third to two-third of the blood normally found in the circulatory system. The pathologist explained that an adult's hand, rather than the twigs, coat hanger, or fly swatter, probably caused the deeper hemorrhages. He said the massive hemorrhaging could have eventually caused Jadasha's death; however, he said Jadasha died from cerebral edema (brain swelling), caused by a blow to her head. The pathologist conservatively counted nine head injuries, any one of which was sufficient to cause Jadasha's death. He said that the amount of force necessary to cause the brain to swell is equivalent to dropping a child on its head from a height higher than three freet onto an uncarpeted floor. Further, the pathologist discussed contusions on Jadasha's forehead, on both cheeks, and over the bridge on her nose as well as scratches and cuts in her face. He also said that several coat hanger type abrasions appeared in Jadasha's face.

Neighbors and friends of the Lewises also attested to the history of abuse to which Jadasha was subjected, primarily by Mrs. Lewis. For example, Amber Nantz, who visited the Lewises testified that she observed injuries on Jadasha on several occasions. When Mrs. Lewis explained in Jadasha's presence how a large black eye occurred, "Jadasha kind of had a funny expression on her fac[e], a funny look on her face that she didn't know what Debra was talking about." Mrs. Nantz also related that Mrs. Lewis withheld food from Jadasha for three days to teach

her a lesson, and during that time she would intentionally eat food in front of Jadasha to see if Jadasha would admit to her hunger. Numerous other witnesses corroborated the signs of injury and abuse inflicted on Jadasha. Another person witnessed Jadasha with a black eye. Several attested to seeing the burn on Jadasha's ear and hearing of the three days of starvation. Most indicated that Debra voluntarily spoke of disciplining Jadasha, and they consistently indicated that the Lewises said they disciplined Jadasha by spanking her with their hands or a fly swatter. A few remembered Debra stating that "if she didn't stop whipping Jadasha she would hurt her or kill her" and "she was going to let James whip [Jadasha because] [s]he wasn't going to go to jail for killing that child." One witness testified that when Mrs. Lewis discussed beating Jadasha, her demeanor demonstrated that Mrs. Lewis thought the disciplining was funny. She also said Mrs. Lewis told her Jadasha had sores on her when she came to live with the Lewises and it therefore was necessary to bathe her in bleach. Another witness testified that she saw Mrs. Lewis strike Jadasha and burst her lip. At least one witness reported the starvation incident to the sergeant, and a few suggested to the Lewises that they needed counseling.

After viewing the evidence in favor of the government, we find the record abundant with evidence to prove that the Lewises had specific intent to inflict great bodily harm upon Jadasha and that they aided and abetted each other in the beatings. There was sufficient evidence regarding the events of the day for the jury to conclude that the Lewises were aware that the other was beating Jadasha and that they assisted each other in some capacity in the beatings. Mr. and Mrs. Lewis both beat Jadasha repeatedly throughout the day of her death. There is no testimony that any other person contributed to the beatings Jadasha endured the day of her death. Without question because of the force accompanying their blows

and the numerous beatings administered with that amount of force, the Lewises intended to cause Jadasha serious bodily harm.

The Lewises claim that they could not have known the effect of their blows because the deep bruises did not surface until later. They also say that they could not have seen the bruises through her clothes. We find this reasoning implausible and disingenuous. First, there was blood visible on Jadasha, her clothes, the walls, floors, window curtain, and the instruments used to beat Jadasha. Some of Jadasha's injuries still oozed blood when she reached the emergency room. The jury could infer that a blow from an adult to a forty-two pound four-year-old with enough force to draw blood capable of leaving the trail described above comes with specific intent to inflict great bodily harm.

Second, Jadasha had several old injuries on her body, especially on the cheeks of her buttocks. The Lewises had proof that the force of their blows would produce injury to Jadasha. This proof did not deter their beatings; instead, they administered many more blows of equal or greater force. We find that the Lewises did not have to see the recently created bruises to know that their blows were in fact causing serious internal injuries. Further, testimony revealed that the body blows would have caused Jadasha's death if the head injuries had not killed her. The jury could conclude that non-accidental blows of this quantity and intensity on a forty-two pound four-year-old from an adult could only come with the specific intent to inflict bodily harm on the child.[15] Likewise, the jury could find that blows from an adult to the abdomen of a child of this age and size came with like intent.

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[15] We are convinced that the Lewises would not have sought medical treatment and would have treated the body bruises themselves with bleach and peroxide as they had treated Jadasha's injuries in the past.

Finally, the Lewises struck Jadasha on the head and caused her brain to swell. Testimony from the pathologist clarified the significance of this type of head injury. The jury reasonably could deduce that a non-accidental blow to a four-year-old's head with force greater than a three-foot fall can only come with specific intent to cause serious bodily harm.

We conclude that there was more than enough evidence for a jury to find beyond a reasonable doubt that Mr. and Mrs. Lewis possessed specific intent to inflict great bodily harm on Jadasha. We reject the Lewises' arguments that the evidence was insufficient; the evidence here allows more than an inference that the defendants beat Jadasha mercilessly and repeatedly throughout the day on her head and body, using far more force that would be acceptable to discipline a four-year-old child. Thus, the Lewises' convictions for first degree murder under Louisiana law could not be reversed on this ground.

2. *Admissibility of the Photographs.*

The Lewises argue that the prejudicial effect of the photographs outweighed their probative value. Additionally, Mr. Lewis asserts that the autopsy photos, which were unusually gruesome and inflammatory, were unfair because the dissections depicted the extent of the bruising, which he could not have known prior to the autopsy.

We review the admissibility of photographic evidence for abuse of discretion. *United States v. Follin*, 979 F.2d 369, 375 (5th Cir.1992). We find that the district court properly weighed the probative value against the prejudicial effect when evaluating the admissibility of the photographs. *See* Fed.R.Evid. 403. The court found the photos relevant to the issue of the defendants' intent and the issue regarding absence of accident. We agree that the photos are relevant for these reasons. Gruesome photographs are relevant when they establish an element of the crime

charged. *United States v. Bowers*, 660 F.2d 527 (5th Cir. Unit B Sept. 1981); *United States v. McRae*, 593 F.2d 700, 707 (5th Cir.), *cert. denied*, 444 U.S. 862, 100 S.Ct. 128, 62 L.Ed.2d 83 (1979); and *United States v. Kaiser*, 545 F.2d 467, 476 (5th Cir.1977). We also agree with the government that under the facts of this case the photos were relevant to counter claims that the Lewises' employed normal disciplinary measures. The extensive bruising divulges the excessive force behind the Lewises' supposedly disciplinary blows. The photos are the best means of conveying to the jury the force behind the blows.

Further, we find that the potential prejudice was consciously minimized here. The district court avoided duplication and limited the prejudicial effect of the photos by requiring the government to reduce the number of photos to be shown to the jury. Of the approximately 130 photos, the government entered only 16 into evidence. In another child abuse case resulting in death, we commented that the photos of the child's lacerated heart

> had the potential to inflame the jury, but we consider it no more inflammatory than photographs that portray this sort of death suffered by the victim in this or any other case where the circumstances of the death are at issue. *United States v. Kaiser*, 545 F.2d 467, 476 (5th Cir.1977). The photograph, here, was essential to the government's case if it was to meet its burden of showing that appellant brought cruel and excessive physical force to bear on her child.

Bowers, 660 F.2d at 529. Thus, the district court acted well within its discretion when allowing the government to present the photos to the jury.

3. *Admissibility of the Lewises' Statements.*

The Lewises argue that the district court erred by overruling their objections to the adequacy of the advice of

rights given to them when they gave statements to investigators. Mr. Lewis asserts that he was not informed that he had a right to a private attorney. Mrs. Lewis claims that she was not advised of her rights until six hours after her initial detention at the hospital, that because of her emotional state she would not comprehend the severity of the situation, that the length of time to give the statement demonstrates the presence of coercion, that she believed the statement had to be given before she could see her son and Jadasha's body, and that she failed to understand the warnings given.

The Supreme Court in *Miranda v. Arizona*, 384 U.S. 436, 479, 86 S.Ct. 1602, 1630-31, 16 L.Ed.2d 694 (1966) established the warnings that a defendant must receive in order for his statement to be admissible at trial. The defendant is free to waive the rights conveyed in the warnings if the waiver is done (1) voluntarily and (2) knowingly and intelligently. *United States v. Andrews*, 22 F.3d 1328, 1337 (5th Cir.), *cert. denied*, —— U.S. ——, 115 S.Ct. 346, 130 L.Ed.2d 302 (1994).

In the present case, the district court held a suppression hearing wherein he heard live testimony from investigators and Mrs. Lewis regarding the warnings given to the defendants. The testimony indicates that the Lewises each received a form containing the customary *Miranda* warnings. The district court found that the military form given to Mr. Lewis adequately apprised him of his rights and allowed him to knowingly waive his rights. Mrs. Lewis received the FBI Miranda warnings form, which she initialed. Additionally, the district court questioned Mrs. Lewis regarding her statements.[14] The court concluded that Mrs. Lewis understood that she was waiving her rights and voluntarily waived the rights after being adequately advised by an investigator. The district court

[14] Mrs. Lewis actually gave two statements. Mrs. Lewis asked to give a second statement so that she could correct inaccurate statements made in the first statement.

admitted the statements into evidence after making these determinations.

The district court saw the live testimony and was in a position to factor body language into its credibility determinations. Accordingly, with the exception of the voluntary issue, we must accept the district court's factual findings regarding the interrogations unless the findings are clearly erroneous. *United States v. Foy*, 28 F.3d 464, 474 (5th Cir.), *cert. denied*, —— U.S. ——, 115 S.Ct. 610, 130 L.Ed.2d 520 (1994). We cannot say that these findings are clearly erroneous based upon the record before us.

The issue of voluntariness is a legal question, 22 F.3d at 1340 n. 12. A waiver is voluntary when it is "the product of a free and deliberate choice rather than intimidation, coercion, or deception." *Id.* at 1337. Nothing in the record demonstrates that the Lewises waived their rights because of intimidation, coercion, or deception. We cannot say that the district court erred in denying the Lewises' motions to suppress their statements.

4. *The Battered Woman's Syndrome Defense.*

Mrs. Lewis argues that she suffered from Battered Women's Syndrome which diminished her capacity to develop specific intent to kill or inflict great bodily harm on Jadasha or to aid and abet Mr. Lewis to do the same. We concluded above that the government presented sufficient evidence to allow the jury to find that Mrs. Lewis had specific intent to inflict great bodily harm on Jadasha. The jury heard and evaluated the testimony regarding Battered Women's Syndrome. The jury chose not to believe that the Syndrome affected her ability to develop the intent necessary to commit murder. We find no basis in the record to disturb the jury's credibility choices. *See United States v. Garcia*, 86 F.3d 394, 398 (5th Cir.1996) (noting that the appellate court must

accept the credibility choices supporting the verdict); and *United States v. Straach*, 987 F.2d 232, 237 (5th Cir. 1993) (noting that the appellate court cannot weigh and assess the credibility of the witnesses).

Based on our evaluations of the record, we find no merit to any of the Lewises' evidentiary claims of error. Therefore, we will not compel the government to waste time and resources reindicting the Lewises, duplicating the trial, presenting the same sufficient evidence, and proving the same elements where the jury has already spoken loudly, clearly, and correctly. The jury found the Lewises guilty and, under the circumstances of this case, a new trial would not change this.

CONCLUSION

For the foregoing reasons, we AFFIRM the convictions and sentences of James M. Lewis and Debra Faye Lewis for murder of Jadasha D. Lowery even though the indictment, erroneously charged them with first degree murder under La.Rev.Stat. § 14:30A(5) pursuant to the Assimilative Crimes Act rather than 18 U.S.C. § 1111.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

(Title Omitted)

Appeal from the United States District Court
for the Western District of Louisiana, Lake Charles

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC
(September 16, 1996)

Before JOLLY, DUHE and STEWART, Circuit Judges.

PER CURIAM:

(✔) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FRAP and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

ENTERED FOR THE COURT:

/s/ Paul E. Stewart
United States Circuit Judge

SUPREME COURT OF THE UNITED STATES

No. 96-7151

DEBRA FAYE LEWIS,
Petitioner

v.

UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

May 12, 1997

ORDER LIST

TUESDAY, MAY 13, 1997

ORDER IN PENDING CASE

96-7151 LEWIS, DEBRA F. v. UNITED STATES

The order granting the petition for a writ of certiorari is amended to read:

The motion of petitioner for leave to proceed *in forma pauperis* is granted. The petition for a writ of certiorari is granted limited to the following question: Whether petitioner was properly charged and convicted for the murder of her four-year old stepdaughter under the Assimilative Crimes Act, 18 U.S.C. § 13, and the Louisiana child murder statute, 14 La. Rev. Stat. Ann. § 30A(5), and if not, whether the sentence was proper?

(5)

No. 96-7151

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

DEBRA FAYE LEWIS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

Whether Petitioner was properly charged and convicted for the murder of her four-year old stepdaughter under the Assimilative Crimes Act, 18 U.S.C. § 13, and the Louisiana Child Murder Statute, 14 La.Rev.Stat.Ann. § 30A(5).

And if not, whether the sentence was proper.

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UNITED STATES SENTENCING GUIDELINES

STATE STATUTES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

No. 96-7151

DEBRA FAYE LEWIS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF FOR PETITIONER

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (J.A. 64-92) is reported at 92 F.3d 1371. The denial of the Petition for Rehearing and Suggestion for Rehearing En Banc (J.A. 77) is reported at 99 F.3d 1137. The opinion of the district court denying the Motion to Dismiss Indictment (J.A. 8-18) is reported at 848 F.Supp. 692.

JURISDICTION

The Court of Appeals for the Fifth Circuit denied a Petition for Rehearing and Suggestion for Rehearing En Banc on September 16, 1996. The judgment of the Court of Appeals for the Fifth Circuit was entered as mandate

on September 24, 1996 (J.A. 63). The Petition for a Writ of Certiorari was filed on December 16, 1996, and granted on May 12, 1997. This court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1) The Constitution, Art. I, § 1 provides:

"All Legislative Powers herein granted shall be vested in the Congress of the United States, which shall consist of a Senate and House of Representatives."

2) Relevant Louisiana criminal statutes:

14 LA.Rev.Stat. Ann. § 30
(Louisiana First degree murder Statute)

"§ 30. First degree murder

A. First degree murder is the killing of a human being:

(1) When the offender has specific intent to kill or to inflict great bodily harm and is engaged in the perpetration or attempted perpetration of aggravated kidnapping, second degree kidnapping, aggravated escape, aggravated arson, aggravated rape, forcible rape, aggravated burglary, armed robbery, drive-by shooting, first degree robbery, or simple robbery.

* * *

(5) When the offender has the specific intent to kill or to inflict great bodily harm upon a victim under the age of twelve or sixty-five years of age or older.

* * *

C. Whoever commits the crime of first degree murder shall be punished by death or life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence in accordance with the determination of the jury."

LA.Rev.Stat.Ann. § 30.1
(Louisiana Second degree murder Statute)

"§ 30.1 Second degree murder

A. Second degree murder is the killing of a human being:

(1) When the offender has a specific intent to kill or to inflict great bodily harm; or

* * *

B. Whoever commits the crime of second degree murder shall be punished by life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence."

LA.Rev.Stat.Ann. § 31
(Manslaughter Statute)

"§ 31. Manslaughter

A. Manslaughter is:

(1) A homicide which would be murder under either Article 30 (first degree murder) or Article 30.1 (second degree murder), but the offense is committed in sudden passion or heat of blood immediately caused by provocation sufficient to deprive an average person of his self-control and cool reflection. Provocation shall not reduce a homicide to manslaughter if the jury finds that the offender's blood had actually cooled, or that an average person's blood would have cooled, at the time the offense was committed; or

(2) A homicide committed, without any intent to cause death or great bodily harm.

* * *

B. Whoever commits manslaughter shall be imprisoned at hard labor for not more than forty years. . . ."

LA.Rev.Stat.Ann. § 93
(Cruelty to a juvenile)

"§ 93. Cruelty to juveniles

A. Cruelty to juveniles is the intentional or criminally negligent mistreatment or neglect, by anyone over the age of seventeen, of any child under the age of seventeen whereby unjustifiable pain or suffering is caused to said child. Lack of knowledge of the child's age shall not be a defense.

* * *

D. Whoever commits the crime of cruelty to juveniles shall be fined not more than one thousand dollars or imprisoned with or without hard labor for not more than ten years, or both."

3) Relevant federal criminal statutes:

18 U.S.C. §§ 7 and 13
(Assimilative Crimes Act)

"§ 7. Special maritime and territorial jurisdiction of the United States defined

The term "special maritime and territorial jurisdiction of the United States," as used in this title, includes:

(1) The high seas, any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State, and any vessel belonging in whole or in part to the United States or any citizen thereof, or to any corporation created by or under the laws of the United States, or of any State, Territory, District or possession thereof, when such vessel is within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State.

* * *

(3) Any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof, or any place

purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building.

* * *

§ 13. Laws of States adopted for areas within Federal jurisdiction

(a) Whoever within or upon any of the places now existing or hereafter reserved or acquired as provided in section 7 of this title, or on, above, or below any portion of the territorial sea of the United States not within the jurisdiction of any State, Commonwealth, territory, possession, or district is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment."

18 U.S.C. § 1111
(Federal First Degree Murder statute and Second Degree Murder statute)

"§ 1111. Murder

(a) Murder is the unlawful killing of a human being with malice aforethought. Every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing; or committed in the perpetration of, or attempt to perpetrate, any arson, escape, murder, kidnapping, treason, espionage, sabotage, aggravated sexual abuse or sexual abuse, burglary, or robbery; or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed, is murder in the first degree.

Any other murder is murder in the second degree.

(b) Within the special maritime and territorial jurisdiction of the United States.

Whoever is guilty of murder in the first degree shall be punished by death or by imprisonment for life;

Whoever is guilty of murder in the second degree, shall be imprisoned for any term of years or for life."

18 U.S.C. § 1112
(Federal Manslaughter statute)

"§ 1112. Manslaughter

(a) Manslaughter is the unlawful killing of a human being without malice. It is of two kinds:

Voluntary—Upon a sudden quarrel or heat of passion.

Involuntary—In the commission of an unlawful act not amounting to a felony, or in the commission in an lawful manner, or without due caution and circumspection, of a lawful act which might produce death.

(b) Within the special maritime and territorial jurisdiction of the United States,

Whoever is guilty of involuntary manslaughter, shall be fined under this title or imprisoned not more than ten years, or both;

Whoever is guilty of involuntary manslaughter, shall be fined under this title or imprisoned not more than six years, or both."

18 U.S.C. § 3553(b)
(Imposition of a sentence)

"§ 3535. Imposition of a sentence

* * *

(b) Application of guidelines in imposing a sentence.—The court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission."

* * *

4) United States Sentencing Guidelines:

U.S.S.G. § 2A.1.1

"§ 2A.1. First Degree Murder

(a) Base Offense Level: 43"

U.S.S.G. § 2A1.2

"§ 2A1.2 Second Degree Murder

(a) Base Offense Level: 33"

U.S.S.G. § 3A1.1

"§ 3A1.1 Hate Crime Motivation or Vulnerable Victim

(a) If the finder of fact at trial or, in the case of a plea of guilty or nolo contendere, the court at sentencing determines beyond a reasonable doubt that the defendant intentionally selected any victim or any property as the object of the offense because of the actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation of any person, increase by 3 levels.

(b) If the defendant knew or should have known that a victim of the offense was unusually vulnerable due to age, physical or mental condition, or that victim was otherwise particularly susceptible to the criminal conduct, increase by 2 levels.

(c) Special Instruction

(1) Subsection (a) shall not apply if an adjustment from § 2H1.1(b)(1) applies."

5) Relevant Federal Rules of Criminal Procedure:

Fed. Rules Cr. Proc. Rule 7, 18 U.S.C.A.

"Rule 7. The Indictment and the Informaiton

(a) Use of Indictment or Information. An offense which may be punished by death shall be prosecuted by indictment. An offense which may be punished by imprisonment for a term exceeding one year or at hard labor shall be prosecuted by indictment or, if indictment is waived, it may be prosecuted by information. Any other offense may be prosecuted by indictment or by information. An information may be filed without leave of court.

* * *

(c) Nature and Contents.

(1) In General. The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. It shall be signed by the attorney for the government. It need not contain a formal commencement, a formal conclusion or any other matter not necessary to such statement. Allegations made in one count may be incorporated by reference in another count. It may be alleged in a single count that the means by which the defendant committed the offense are unknown or that the defendant committed it by one or more specified means. The indictment or information shall state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated.

* * *

(3) Harmless Error. Error in the citation or its omission shall not be ground for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to the defendant's prejudice."

* * *

Fed. Rules Cr. Proc. Rule 52, 18 U.S.C.A.

"Rule 52. Harmless Error and Plain Error

(a) Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

(b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

STATEMENT OF THE CASE

DEBRA LEWIS and her husband, James, were interviewed by FBI agents and arrested for the beating death of Jadasha D. Lowery that occurred at Fort Polk, a military base in Vernon Parish, Louisiana.

An indictment was filed on January 4, 1994 charging that DEBRA FAYE LEWIS "did, with specific intent to inflict great bodily harm, commit first degree murder of Jadasha D. Lowery, a human being under the age of twelve years, in violation of Title 14, Louisiana Revised Statutes Annotated, Section 30(5), all in violation of Title 18, United States Code, Sections 7, 13, and 2. [18 U.S.C. §§ 7, 13, and 2; La.R.S. 14:30(5)]. (J.A.4-5.)

A Motion to Dismiss Indictment (J.A. 5-7) urging the improper assimilation of a state criminal statute through the Assimilative Crimes Act (ACA) rather than by indictment under the federal homicide statutes (18 U.S.C. §§ 1111-1112) was filed on February 11, 1994 and denied by the district court in a memorandum ruling (J.A. 8-18) dated April 6, 1994. (J.A. 19.)

After a trial on March 6-10, 1995 and March 13-14, 1995, a guilty verdict to first degree murder pursuant to Louisiana law was returned against DEBRA FAYE LEWIS.

A sentencing hearing was conducted on August 22, 1995. At sentencing, the district court imposed a sentence of life imprisonment pursuant to 18 U.S.C. § 3553 and the United States Sentencing Guidelines (J.A. 41-61). Notice of Appeal was filed on August 30, 1995 (J.A. 62).

On appeal, DEBRA FAYE LEWIS urged that her federal prosecution by assimilation of the Louisiana first degree murder statute through the ACA was improper and that the conviction should be reversed and the matter remanded for a new trial. Petitioner contended that a specific federal criminal statute existed (federal murder statute) and that to authorize the assimilation of a state criminal statute allowed prosecution for a crime already made criminal under a specific applicable federal statute, the assimilation may lessen the burden of proof or change the elements of a crime required to be proven to obtain a conviction, and the assimilation sought to impose a penalty allowed by state law which was not provided by federal

law, if charged under the appropriate federal criminal statute.

The Court of Appeals held that the assimilation of the Louisiana first degree murder statute was improper under the ACA and the indictment was invalid. The Court of Appeals reviewed the state and federal statutes in light of the "precise acts" test set forth by this Court in *Williams v. United States*, 327 U.S. 711, 66 S.Ct. 778, 90 L.Ed. 962 (1946) and found that the conduct sought to be prosecuted was prohibited by applicable federal statutes; therefore, the ACA could not be used to charge, prosecute, and convict someone under a state criminal statute in lieu of the federal criminal statute prohibiting the same criminal conduct. The court concluded that the Louisiana first degree murder statute "filled no gaps" in existing "federal law, but, on the contrary, would impermissibly enlarge the scope of the federal murder statute.

Notwithstanding the fact that the Court of Appeals held that the ACA could not be used to prosecute the petitioner under a Louisiana criminal statute, and the indictment itself was invalid, it affirmed the conviction of the defendant under the analogous federal crime of second degree murder (18 U.S.C. § 1111(a)) and affirmed the sentence of life imprisonment originally imposed. The Court of Appeals held that the citation and reference to the Louisiana first degree murder statute was "harmless error." The court reasoned that the indictment placed the petitioner on notice of the "murder" charge against her and that a new trial would not be necessary. The court dismissed petitioner's arguments that the federal criminal statute required a different criminal element than the Louisiana statute and further rejected petitioner's arguments that the difference in criminal elements required for conviction under federal law as compared to state law were prejudicial to the defendant and required a new trial. The Court of Appeals reasoned that the federal crime of second degree murder, 18 U.S.C. § 1111(a), was analogous with and equivalent to Louisiana first degree murder;

it then held that the evidence supported a conviction under the federal murder statute, and entered a judgment of conviction of federal second degree murder.

The Court of Appeals affirmed a sentence of life imprisonment. It reasoned that because the crime of federal second degree murder carried a maximum statutory penalty of up to life imprisonment, the sentnece imposed by the trial court under the Louisiana first degree murder statute was within the statutory maximum; therefore, a remand for resentencing was unnecessary.

SUMMARY OF THE ARGUMENT

The Assimilative Crimes Act was enacted to allow the federal government to fill in the gaps in existing federal criminal statutes by assimilating or using state criminal statutes to prosecute offenders for acts occurring on federal enclaves where there is no federal criminal law or statute directly punishing the offender's conduct. In order for a federal prosection to assimilate or use a state criminal statute in its prosecution, the following must exist: 1) the offense sought to be punished must have occurred on a federal enclave or on ". . . land reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof, . . ." (18 U.S.C. § 7(3); and, 2) the conduct or act sought to be made punishable "*. . . although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the state . . . in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.*" (18 U.S.C. § 13 emphasis added.)

It is improper to prosecute a defendant in federal court for conduct which occurred on a federal enclave under state law when a federal criminal statute proscribes that precise conduct.

The Court of Appeals properly held that the federal murder statutes proscribed the precise conduct charged, and that the assimilation of the Louisiana first degree murder statute and subsequent prosecution of petitioner under that assimilated state statute was improper. The Court of Appeals correctly held that the indictment was invalid; however, the court erred in holding that the invalid indictment was a "flawed assimilation" and constituted "harmless error," thereby permitting affirmance of a conviction of federal second degree murder and the sentence of life imprisonment.

After concluding that the indictment was invalid, the conviction should have been reversed and the case remanded for a new trial under the appropriate federal criminal statute. The federal homicide statutes and the Louisiana murder statutes provide their own statutory framework and scheme defining the criminal conduct constituting the offense, the specific factors or characteristics of the offense, the specific elements of proof required to convict an offender of that offense, and the punishment for the offense.

The invalid indictment carried with it a prosecution of petitioner under the Louisiana first degree murder statute.

In the event this Court holds that the prosecution under the ACA was improper, but the conviction under the analogous federal second degree murder statute proper, this court must reverse the sentence and remand for resentencing. Sentencing under the federal sentencing guidelines is mandatroy. The Court of Appeals affirmed a sentence of life imprisonment stating that it was within the maximum statutory penalty even though it exceeded the maximum sentencing guideline range applicable to the "analogous" federal crime upon which petitioner was convicted.

Both the district court and the Court of Appeals were obligated to apply the sentencing guidelines for federal second degree murder. They did not. The Court of

Appeals affirmed the trial court's sentence of life imprisonment that was based upon the sentence mandated by the Louisiana first degree murder statute and the analogous sentencing guideline for federal first degree murder which the trial court found applied to the conviction under Louisiana law. Under this Court's previous rulings, the statutory maximum sentence is the "maximum sentencing guideline range." Here, the maximum guideline range, including an enhancement for a vulnerable victim, was 210 months. The sentence imposed exceeded the maximum under the sentencing guidelines and must be reversed and the matter remanded for resentencing pursuant to the sentencing guidelines.

ARGUMENT

INTRODUCTION:

The Court granted petitioner's writ of certiorari, limited to the following questions:

> (1) whether the petitioner was properly charged and convicted for the murder of the four-year-old stepdaughter under the Assimilative Crimes Act, 18 U.S.C. § 13, and the Louisiana child murder statute, 14 La.Rev.Stat.Ann. § 30A(5); and (2) if not, whether the sentence was proper?

I. THE FIFTH CIRCUIT CORRECTLY CONCLUDED THAT THE GOVERNMENT IMPROPERLY INVOKED THE ASSIMILATIVE CRIMES ACT TO CHARGE AND CONVICT PETITIONER OF MURDER IN FEDERAL DISTRICT COURT BASED UPON A LOUISIANA STATUTE.

The indictment in this case charged DEBRA FAYE LEWIS with first degree murder under the Louisiana first degree murder statute, 14 LA.Rev.Stat.Ann. § 30A(5) pursuant to the Assimilative Crimes Act (ACA) 18 U.S.C. Sections 7, 13, rather than under the federal murder statute, 18 U.S.C. § 1111. The Assimilative Crimes Act provides:

"§ 7. Special maritime and territorial jurisdiction of the United States defined

The term "special maritime and territorial jurisdiction of the United States," as used in this title, includes:

(1) The high seas, any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State, and any vessel belonging in whole or in part to the United States or any citizen thereof, or to any corporation created by or under the laws of the United States, or of any State, Territory, District, or possession thereof, when such vessel is within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State.

* * *

(3) Any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building."

* * *

"§ 13. Laws of States adopted for areas within Federal jurisdiction

(a) Whoever within or upon any of the places now existing or hereafter reserved or acquired as provided in section 7 of this title, or on, above, or below any portion of the territorial sea of the United States, not within the jurisdiction of any State, Commonwealth, territory, possession, or district is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof

in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment."

The Federal Government can use the ACA to prosecute a defendant for a crime committed on federal property when the act (crime) is not made punishable by an act of Congress but is punishable under state law. This allows federal prosecutors to use state laws "to fill in the gaps" where no federal criminal statute exists.

Defendant filed a Motion to Dismiss Indictment based upon the improper use of the ACA which was denied by the district court. The trial court in denying the Motion to Dismiss Indictment stated that the federal murder statute did not cover the "precise act" as did the state statute, and the state statute prosecuted child abuse whereas the federal murder statute did not (J.A. 8-18). This is an erroneous interpretation of Louisiana law and the ACA.

The federal murder statute, 18 U.S.C. Section 1111, defines first and second degree murder as follows:

> (a) Murder is the unlawful killing of a human being with malice aforethought. Every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing; or committed in the perpetration of, or attempt to perpetrate, any arson, escape, murder, kidnapping, treason, espionage, sabotage, aggravated sexual abuse or sexual abuse, burglary, or robbery; or perpetrated from premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed, is murder in the first degree.
>
> Any other murder is murder in the second degree.
>
> (b) Within the special maritime and territorial jurisdiction of the United States.
>
> Whoever is guilty of murder in the first degree shall be punished by death or by imprisonment for life;

> Whoever is guilty of murder in the second degree, shall be imprisoned for any term of years or for life."

Whereas the Louisiana first degree murder statute, 14 LA.Rev.Stat.Ann. § 30A (5) provides a definition for first degree murder as follows:

> "A First Degree Murder is the killing of a human being:
>
> 5) When the offender has the specific intent to kill or to inflict great bodily harm upon a victim under the age of twelve years."

The Court of Appeals held that the assimilation of the Louisiana murder statute was improper under the ACA as it failed to meet the "precise acts" test as elucidated by this Court in *Williams v. United States*, 327 U.S. 711, 66 S.Ct. 778, 90 L.Ed. 962 (1946), but that the evidence adduced at trial was sufficient to uphold a conviction of the crime of federal second degree murder (J.A. 64-92).

The only difference between the prohibited conduct of the two statutes is that the Louisiana statute provides if a murder is committed upon a member of a specific category of individuals (a victim under the age of twelve years) the conviction is for first degree murder. However, the federal statute does not define first degree murder by age classification. If the elements of the crime are met, it applies to all victims, regardless of age. It is obvious from reading the federal and state criminal statutes that the federal murder statute covers all human beings regardless of age. The "precise act" prohibited, murder, is committed if the requisite elements of the crime have been perpetrated.

The government in its brief in opposition to the Petition for Writ of Certiorari urged that the Louisiana murder statute punishes child abuse which was not specifically

prohibited by the federal murder statute. (Pet. Opp. 11-14.) As such, the argument goes, the Louisiana crime of murder of a child under the age of twelve is not the precise act prohibited by the federal murder statute: the killing of a human being. This begs the question. The State of Louisiana has another applicable statute which deals with cruelty to juveniles.[1] Obviously, the government could have prosecuted the defendant under the federal second degree murder statute and assimilated the state cruelty to juveniles statute as a separate charge had it so desired [see *United States v. Brown*, 608 F.2d 551 (5th Cir. 1979)]. But, in this case the purpose for the assimilation was to try DEBRA FAYE LEWIS in federal court for a state crime of first degree murder which carried a greater penalty (sentence) than the only applicable federal statute, second degree murder. This prosecution was not to further the state's interest in deterring child abuse.

The ACA cannot be used to expand federal law or to supplement federal law to allow prosecution under a state law which either more broadly defines or more severely penalizes the same offense. In *Williams*, supra, the government sought to prosecute Mr. Williams under an Arizona criminal statute for statutory rape. Arizona law provided that any sexual intercourse with a female under the age of eighteen met the definition of statutory rape. The alleged rape occurred on an Indian reservation which was a federal enclave and land under the exclusive control of the United States. However, the federal criminal statutes punished carnal knowledge of a minor girl and required as an element of the offense that the prohibited act must be with a woman under the age of sixteen. The Arizona criminal statute more broadly defined the crime sought to be prosecuted. This Court held that the ACA could not be used to re-define or enlarge a crime. Furthermore, this Court held that the ACA did not make the Arizona statute applicable because the "precise act" upon which the con-

[1] See, 14 LA.Rev.Stat.Ann. § 93 Cruelty to Juveniles, *infra* p. 4.

viction depended had been made penal by an Act of Congress when it defined adultery. This principal is applicable to the case at bar and underscores the Court of Appeals' proper rejection of the government's attempt to assimilate the Louisiana first degree murder statute to the instant prosecution. Congress defined first degree murder,[2] second degree murder,[3] and manslaughter[4] under the federal homicide statutes. The State of Louisiana has its own statutory scheme defining homicide into first degree murder,[5] second degree murder,[6] and manslaughter[7] which differ in definition and scope from those of the federal government. The federal government cannot prosecute a defendant under a state criminal statute if the crime for which it seeks to prosecute that defendant is defined by Congress and is made penal by an act of Congress. The Constitution provides that "[a]ll Legislative Powers herein granted shall be vested in the Congress of the United States, which shall consist of a Senate and House of Representatives." U.S. Const. Art. I § 1. In the case at bar, the crime of murder has been defined by Congress and is a criminal act which is proscribed by specific legislative acts, the federal homicide statutes.

The 6th Circuit Court of Appeals in *United States v. Griffith*, 864 F.2d 421 (6th Cir. 1980) grouped the ACA into four categories of cases. The first group finds all actions are criminal under federal law are also criminal under state law, but state law makes other acts criminal as well. In this group of crimes, all that may be different is a definition of one of the elements of the crime as in

[2] 18 U.S.C. § 1111.

[3] 18 U.S.C. § 1111.

[4] 18 U.S.C. § 1112.

[5] 14 LA Rev.Stat.Ann. § 30.

[6] 14 LA Rev.Stat.Ann. § 30.1.

[7] LA Rev.Stat.Ann. § 31.

Williams, supra, the age of consent, or the federal statute may require an additional proof requirement that is not required in the state statute. Merely because there is a different definition or that the federal statute may require different elements of proof does not make the state law available through the ACA. This reasoning takes into consideration that under federalism, each state may determine which acts it deems criminal and it may define that crime in its own way and set out the particular elements of each crime. But, this unique form of government does not allow each state to re-define a federal criminal statute or make criminal an act on a federal enclave that Congress has not prohibited by a legislative act.

In the second group of cases, the federal law encompasses a broader area than the state law, but usually the state law carries greater penalties or greater ease of proof. In these cases, the federal law already occupies the field and the courts have held that the ACA cannot be used to enhance punishment or facilitate a conviction.

The third group includes cases where state and federal laws overlap to a degree but each occupies an area not covered by the other statute. In those cases, prosecution could be maintained either under the federal or state law. The reason state law can be used is because the two competing statutes have two completely different theories of criminal conduct involved. A case along that line was *United States v. Brown,* 608 F.2d 551 (5th Cir. 1979) which held that a state child abuse statute better fit the facts of a case than the federal assault statute.

The last group of cases is where there are overlapping state and federal laws. However, in this group of cases, an act may be a crime under a state law, but not under federal law. This may be that under one statute or the other, specific intent is required or some other act or element of proof which is not found in the other statute.

Contrary to the holding of the Fifth Circuit, the case at bar falls in the first group of cases. The government

seeks to prosecute DEBRA FAYE LEWIS under the Louisiana first degree murder statute because it facilitates conviction and lessens its burden of proof. In more than one way, the state statute makes it easier for the prosecution to prove its case. First, all the prosecution has to prove under the state statute is that the defendant has either specific intent to kill *or* specific intent to inflict great bodily harm (emphasis added) and prove that the victim was under the age of twelve years. Under the federal murder statute, the prosecution is required to prove the unlawful killing of a human being with malice aforethought. This requires specific intent to kill which a jury might infer to be a different standard of proof than an intent to inflict great bodily harm.[8] From reading the trial testimony, it is clear that neither DEBRA FAYE LEWIS or her husband had the specific intent to kill the child, Jadasha D. Lowery. Under the state statute, the prosecution need only prove the intent to inflict great bodily harm, the child died, and the child was under the age of twelve. This would allow a conviction for first degree murder under the state statute, but not under the federal first degree murder statute which requires a finding of premeditation with malice aforethought and that the death occurred during the commission of one of the prohibited acts set forth in the statute.

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[8] Although the question whether the use of the state statute in place of the federal statute deprived the defendant of any trial defenses causing her prejudice was not granted in petitioner's Petition for Certiorari, defendant contends that the use of the Louisiana murder statutes denied her the ability to fully argue a diminished capacity defense which is appropriate under a federal prosecution. This concern is even more poignant in that DEBRA FAYE LEWIS sought to introduce evidence of Battered Women's Syndrome to overcome the malice aforethought element required in a federal murder proescution. Certainly, diminished capacity may disprove conduct which is "reckless and wanton and a gross deviation from a reasonable standard of care, or of such a nature that the fact finder is warranted in inferring that the defendant was aware of a serious risk of death or serious bodily injury." (See *United States v. Ryan,* 9 F.3d 660, 671-2, n.11).

Tied into this is the penalty aspect of the case. Because the burden of proof is more difficult under the federal first degree murder statute, it is likely that a conviction for federal second degree murder or manslaughter might be returned. Under the Louisiana murder statutes, if a first degree murder conviction is not returned, the jury can convict on second degree murder or manslaughter. Under the state murder statutes, first degree murder carries a penalty of death or life in prison, second degree murder carries a penalty of life in prison, and manslaughter carries a penalty of up to forty years in prison.[9] Under the federal murder statutes, first degree murder carries a penalty of death or life in prison, second degree murder carries a penalty of any term of years or for life, and manslaughter is divided into voluntary manslaughter which carries a penalty of up to ten years in prison and involuntary manslaughter carries a penalty of up to six years in prison.[10] Clearly, the prosecution under the state criminal statute was an attempt to guarantee an enhanced penalty, even if a responsive verdict was returned. The purpose of the ACA is not to allow a federal prosecutor to choose between federal and state criminal statutes to determine which one might afford an easier burden of proof or a more severe penalty for the crime. The purpose of the ACA is to allow a federal prosecution for conduct occurring on a federal enclave under state law, provided there is no federal criminal statute prosecuting that precise conduct. The conduct proscribed by the federal murder statute is the "precise act" which is sought to be prosecuted under state criminal law: murder of a human being. Neither the prosecutor nor the trial judge is allowed to forum shop based upon whether a federal or state criminal statute is used. A prosecution in federal

[9] See brief, *infra*, p. 3.

[10] See brief, *infra*, p. 7. Further, 18 U.S.C. § 1112, the manslaughter statute was amended by Pub.L. 102-322 to increase the term of imprisonment from three years (as it was at the time of the instant offense) to six years.

court should be based upon conduct occurring on a federal enclave in violation of a federal statute, and only in the absence of a federal statute prohibiting the conduct, should the government assimilate a state criminal statute. The prosecutor is not entitled to invoke the ACA to prosecute DEBRA FAYE LEWIS under a state criminal statute when an applicable federal criminal statute prohibiting the conduct sought to be punished exists.

In *United States v. Griffith,* supra, the court held that the ACA could be used to prosecute Mr. Griffith under state law for shooting a person while hunting on a federal military reservation. The federal assault statute required specific intent whereas the applicable state statute provided only for reckless assault. The court found that the ACA was applicable in that case because under the *Williams* Doctrine, reckless shooting in the case before it would not be a crime under the federal law, but was a crime under state law. The court further found that this result was clearly intended under the ACA because Congress enacted the ACA to "use local statutes to fill in gaps in the Federal Criminal Code." If the applicable federal law does not prescribe the "precise act" (crime) which is sought to be punished, then state law may be assimilated to fill in the gaps. Where there are no gaps to be filled in, state law cannot be used for purposes of obtaining an enhanced penalty or to facilitate conviction.

In *United States v. Brown,* 608 F.2d 551 (5th Cir. 1979), the court found that the ACA could be used to charge Ms. Brown with child abuse pursuant to Texas law rather than simple assault under the federal assault statute. In *Brown,* supra, the court found that the state abuse statute closely fit the facts of the case because the child had been abused rather than simply assaulted. The court distinguished the decision in *Williams,* supra, by stating that the court was not trying to enlarge the scope of the penal offense prescribed by the Congress by apply-

ing a conflicting state definition under the ACA. In *Brown*, supra, the court found that the "precise act" was not prohibited by the federal statute, but was prohibited by the state statute. Therefore, the ACA could be invoked to charge Ms. Brown with child abuse.[11]

In *United States v. Patmore,* 475 F.2d 752 (10th Cir. 1973), the court reversed a conviction for an assault by the defendant while in prison at Leavenworth, Kansas, federal penitentiary. Mr. Patmore was indicted in federal court for aggravated battery pursuant to a Kansas statute through the ACA. Patmore contended that the federal assault statute applied in his case. The court found that Patmore was correct and he should have been prosecuted under the federal statute and not the state statute. The difference between the two statutes was that the federal statute required intent to do bodily harm whereas the Kansas statute made no mention of any specific intent. Even though there was a difference in the elements of proof required, the court held that where a federal statute defined the crime, it could not be re-defined by application of the ACA in adopting a state Statute.

This should not be confused with those cases in which the courts have allowed the use ot the ACA to adopt portions of a state statute or law which does not overlap federal law, even though the general state law may overlap federal law to a certain extent. The basis for this is that the particular portion of state statutes adopted go to conduct or crimes which were not defined or proscribed by a specific federal statute. Examples of these cases involve defendants charged with sexual assault or some sex offense under state law, whereas the only applicable federal statute is an assault offense. Because the state sex offense statutes

[11] Petitioner does not deny that she could have been charged with two separate offenses: federal second degree murder, 18 U.S.C. § 1111(a), and cruelty to juveniles pursuant to Louisiana law, 14 LA Rev.Stat.Ann. § 93. See also, *United States v. Fesler,* 781 F.2d 384 (5th Cir. 1986).

are normally very specific as far as the relevant conduct of the defendant is concerned, and the federal assault statute is general in nature and does not proscribe those particular acts, the courts have found that it is not a violation of the ACA to allow prosecution under a particular state statute. See *United States v. Eades,* 633 F.2d 1075 (4th Cir. 1980); *United States v. Smith,* 574 F.2d 988 (9th Cir. 1978) in which convictions under state law were valid even though there was a federal rape statute when the rape statutes specifically made acts of sodomy penal in nature. Congress has sought to invoke distinctions in drafting these criminal statutes. Had Congress wanted to make similar distinctions or categories in the murder statutes, it could have done so. Its silence, in no way renders the federal murder statutes less forceful.

Also going to the heart of this discussion is the fact that once a state statute is assimilated by the ACA, then its penalties are also imposed upon the defendant.[12] Clearly, in the case at bar, the attempt by the prosecution to use the Louisiana first degree murder statute and its penalties was an attempt to obtain a greater punishment in case the defendants were not found guilty of first degree murder. This is not appropriate. This Court in *Commonwealth of Pennsylvania v. Nelson,* 350 U.S. 497, 100 L.Ed. 640, 76 S.Ct. 477 (1956) referred to Justice Holmes' statement in *Charleston & Western Carolina R. Co. v. Vanville Furniture Co.,* 237 U.S. 597, 604, 35 S.Ct. 715, 717, 59 L.Ed. 1137 in affirming the dismissal of a sedition prosecution under state law whenever a federal criminal statute proscribed the same conduct:

> "When Congress has taken the particular subject-matter in hand, coincidence is as ineffective as opposition, and a state law is not to be declared a help

[12] *U.S. v. Johnston,* 876 F.2d 589 (7th Cir. 1989), *certiorari denied,* 493 U.S. 953, 107 L.Ed.2d 350, 110 S.Ct. 364 (1989); *U.S. v. Binder,* 769 F.2d 595 (9th Cir. 1985). U.S.S.G. § 5G1.1(b).

because it attempts to go farther than Congress has seen fit to go." (Id. at 350 U.S. 497, 504, 76 S.Ct. 477, 481).

The federal murder statute clearly proscribes and penalizes the exact conduct upon which the defendant was charged by the state criminal statute. As such, the holding of the Fifth Circuit finding an improper assimilation of the Louisiana murder must be affirmed and this matter remanded to the Court of Appeals with instructions to vacate the sentence of life imprisonment without parole and to remand the case to the district court for resentencing.

II. A SENTENCE OF LIFE IMPRISONMENT FOR CONVICTION OF SECOND DEGREE MURDER UNDER 18 U.S.C. § 1111 EXCEEDS THE MAXIMUM SENTENCING GUIDELINE AND IS PREJUDICIAL TO THE DEFENDANT.

The Fifth Circuit affirmed petitioner's conviction under the analogous federal statute of second degree murder and further affirmed the sentence of life imprisonment by finding that the sentence imposed by the district court did not exceed the statutory maximum sentence the defendant could have received under 18 U.S.C. § 1111. 93 F.3rd 1371 at 1379. The Fifth Circuit found that DEBRA FAYE LEWIS was not prejudiced by her conviction through the Assimilative Crimes Act for Louisiana first degree murder nor by its subsequently entered conviction for murder under the federal second degree murder statute. The Fifth Circuit cited *Hockenberry v. United States*, 422 F.2d 171 (9th Cir. 1970) for the proposition that only if the indictment could not support the sentence would a remand for resentencing be necessary. The Fifth Circuit committed clear error in refusing to remand Mrs. Lewis for resentencing in accordance with the appropriate sentencing guidelines for federal second degree murder.[13]

[13] U.S.S.G. § 2A1.2.

Upon conviction under the Louisiana first degree murder statute, the district court imposed sentence pursuant to what it considered the applicable federal sentencing guideline for Louisiana first degree murder, that being federal first degree murder: U.S.S.G. 2A1.1. At the sentencing hearing (J.A. 54-55), the court found that through the presentence report (PR. ¶ 36 p. 14)[14] the analogous sentencing guideline was that for federal first degree murder. The relevant base offense level was 43. (PR. ¶ 36, p. 14) The court then made a further determination that a two level enhancement for vulnerable victim pursuant to U.S.S.G. 3A1.2 was appropriate. (PR. ¶ 38, p. 14) As a result, the total base offense level was increased to level 45. Mrs. Lewis had no prior criminal history and was assigned a criminal history category of 1. (PR. ¶ 46, p. 15) However, with a base offense level of 45, the sentence required by the sentencing guidelines is life imprisonment without parole. The court recognized that the only sentence it could impose under the sentencing guidelines was one of life imprisonment; therefore, it imposed such a sentence. (J.A. 54-59). The U.S.S.G. abolished parole; therefore, the sentence was actually life imprisonment, without parole.[15]

On appeal, the Fifth Circuit specifically found that the only analogous federal criminal statute for which the defendant could have been convicted was federal second degree murder. The court then found that the sentence imposed by the district court, life imprisonment without parole, was within the maximum sentence amount allowed

[14] The Presentence Report is under seal and it is not included in the Joint Appendix or as an appendix to this brief.

[15] The district court imposed a sentence of life imprisonment. However, as parole was abolished with the adoption of the sentencing guidelines, the sentence is actually life imprisonment without parole. See also *United States v. Analla*, 975 F.2d 119 (4th Cir. 1992), *certiorari denied*, 507 U.S. 1033, 123 L.Ed.2d 476, 113 S.Ct. 1853 (1993).

by the federal statute, 18 U.S.C. § 1111(a). However, the case relied upon by the Fifth Circuit in determining that a remand for resentencing was not necessary, *Hockenberry,* supra, was a decision which predated the enactment and mandatory application of the sentencing guidelines. The Fifth Circuit also relied upon *United States v. Hall,* 979 F.2nd 320 (3rd Cir. 1972), a Third Circuit decision which refused to remand for resentencing because "the sentence imposed on Hall was not higher than that which could have been convicted under the C.F.R." In *Hall,* supra, the sentence was only 45 days out of a statutory maximum of 6 months imprisonment; therefore, the court found no prejudice and no need for remand. *Hall,* supra, involved a crime which would be a petty offense under the sentencing guidelines, and, therefore, the sentencing guidelines would not even apply. 18 U.S.C. § 19 and 18 U.S.C. § 3553B and 28 U.S.C. § 994(w). The Fifth Circuit failed to consider the recent decisions of this Court which have interpreted the maximum statutory sentence to be the maximum applicable guideline range: *United States v. R.L.C.,* 503 U.S. 291, 117 L.Ed.2d 559, 112 S.Ct. 1329 (1992), and *United States v. Granderson,* 511 U.S. 39, 127 L.Ed. 611, 114 S.Ct. 1259 (1994). In these recent decisions, the definition of the statutory maximum sentence has been construed to mean the maximum sentence determined under the sentencing guidelines as applied by 18 U.S.C. Section 3553(a)(4). As noted earlier, the Fifth Circuit relied upon a pre-sentencing guidelines case, *Hockenberry,* supra, and a case in which the sentencing guidelines were not mandatory, *Hall,* supra.

In *R.L.C.,* supra, this Court was concerned with the provisions of the Juvenile Delinquency Act which determined the maximum term of imprisonment that would be authorized had the juvenile been tried and convicted as an adult. This court held that the limitation provided by that particular section of the Juvenile Delinquency Act

referred to the maximum sentence that could be imposed was the maximum sentence provided by the sentencing guidelines. In other words, this Court was faced with the question of which sentence to apply when faced with a conflict between the statutory maximum sentence and a maximum sentence provided by the guidelines which was less than the statutory maximum. The court resolved the issue in favor of finding the maximum sentence to be the maximum sentencing guideline because the sentencing guidelines and their application to sentencing is required by statute, 18 U.S.C. § 3553(b). This court also considered the question of whether to apply a statutory maximum when that maximum would exceed the maximum authorized by the sentencing guidelines themselves, and whether to apply such a maximum would be an unwarranted upward departure from the sentence provided by the sentencing guidelines. In *R.L.C.,* supra, the statutory maximum for the juvenile offender exceeded that which would be authorized under the sentencing guidelines. In resolving the issue, this Court found that the requirements of 18 U.S.C. § 3553(b) provide that the court is to impose a sentence within the range established by the sentencing guidelines, unless the court specifically finds aggravating or mitigating circumstances of a kind or to a degree not taken into consideration by the sentencing commission that would result in a sentence different than what was described by statute. In other words, the sentencing guidelines provide a range within which the sentence is to be imposed unless there are articulated circumstances requiring an upward departure or a downward departure. More importantly for the case at bar is that *R.L.C.,* supra, held that the upper limit of the proper guideline range becomes the maximum term for which a person may be committed to official detention absent circumstances that would warrant an upward departure pursuant to 18 U.S.C. § 3553(b).

In *Granderson,* supra, this Court was also faced with a similar question of applicability of differing sentencing

statutes: the guideline range for the underlying criminal offense or the maximum term of imprisonment imposed by statute. This Court was faced with determining what the appropriate term of imprisonment for probation revocation was: ⅓ of the original applicable sentence or ⅓ of the probationary sentence itself. In *Granderson*, supra, the issue was whether Mr. Granderson would be sentenced to ⅓ of the probationary sentence of 5 years for probation revocation or whether his sentence of imprisonment was limited to ⅓ of the maximum guideline range applicable to the original crime, 6 months imprisonment. The Court of Appeals for the Eleventh Circuit had found that the appropriate sentence was ⅓ of the original 6 month maximum guideline for the original criminal violation and not ⅓ of the 60 month probationary sentence pursuant to the sentencing guidelines. This Court affirmed the Eleventh Circuit's holding.

In the present case, the Fifth Circuit relied upon a pre-sentencing guideline case and on a case which did not require the application of the sentencing guidelines to hold that the sentence imposed upon DEBRA FAYE LEWIS was within the statutory maximum and, therefore, she could not be prejudiced by imposition of a sentence that exceeded the maximum guideline range for the underlying offense, but which was within the maximum sentence provided by statute.

The analysis of the Fifth Circuit is erroneous. DEBRA FAYE LEWIS had no prior criminal history and, therefore, was in a criminal history category I. (PR. ¶ 46, p. 15) The base offense level for federal second degree murder as provided by U.S.S.G. § 2A1.2 mandates a base offense level of 33. If the court enhances the base offense level 2 levels due to a vulnerable victim finding pursuant to U.S.S.G. § 3A1.1, which it did, the base offense level applicable to Ms. Lewis is increased to level 35. A base offense level of 35 with a criminal history category I generates a sentencing guideline range for a conviction of

federal second degree murder of 168 to 210 months. Therefore, the maximum term of imprisonment applicable to the crime for which Ms. Lewis was convicted is 210 months. However, the Fifth Circuit Court of Appeals affirmed a sentence of life imprisonment, without parole. It is noted that a base offense level of 43 mandates a sentence of life imprisonment, without parole. There is no explanation by the Fifth Circuit nor were any findings made or reasons given why a sentence based upon a base offense level of 43 is applied rather than the statutorily required base offense level of 35.

The Fifth Circuit held that "no remand was required for resentencing because such resentencing is only required where the district court has imposed a sentence that exceeds the maximum sentence the defendant would have received if sentenced under applicable federal statutes." 93 F.3d 1371 at 1379. However, the Sentencing Reform Act of 1984 amended 18 U.S.C. § 3553 and created sentencing guidelines which are mandatory. Therefore, the maximum sentence petitioner could receive for second degree murder was 210 months, not life imprisonment. There is no doubt that had the conviction in the district court been for federal second degree murder and the court imposed a sentence of life imprisonment without parole, the sentence would violate 18 U.S.C. § 3553(b) and require the appeals court to vacate the sentence and remand for resentencing due to the substantial prejudice to the defendant. Such a holding is acknowledged by this Court's decision of *Williams v. United States*, 503 U.S. 193, 117 L.Ed.2d 341, 112 S.Ct. 1112 (1993).

Williams, supra, held that where a district court departed from the sentencing guidelines for proper and improper reasons, the sentence must be vacated and remanded for resentencing unless it be shown that the errors of the district court would not have affected the sentence. In this case, the district court imposed a sentence which was 8 offense levels above the maximum

applicable sentencing guideline range and gave no reasons other than it used the federal sentencing guideline for federal first degree murder, U.S.S.G. § 2A1.1, which it believed to be appropriate based upon a conviction of Louisiana first degree murder (PR ¶ 36, p. 14). The Louisiana first degree murder statute required a sentence of imprisonment without parole.[16] Since the Court of Appeals specifically found that the federal prosecution pursuant to the Assimilative Crimes Act was improper, the court could not use the conviction of a Louisiana criminal statute as the basis for an upward departure pursuant to the sentencing guidelines. More importantly, the Court of Appeals specifically held that the crime for which petitioner was guilty, and upon which the conviction was affirmed, was federal second degree murder. The sentencing guidelines applicable to federal second degree murder must be applied. To do otherwise would allow an upward departure upon an improper conviction using an improperly assimilated state criminal statute for conduct which had been previously proscribed by Congress and which is governed exclusively by the federal sentencing guidelines. This court in *Williams v. United States*, supra, found in 1946 that it would be improper to allow prosecution of a crime under state criminal laws which is specifically prohibited by applicable federal criminal statutes. This is ever more so when the state criminal statute imposes a more severe penalty than the applicable federal criminal statutes. In *Williams*, this Court held that since the federal criminal statute specifically proscribed the "precise act" sought to be prosecuted, a prosecution under the Assimilative Crimes Act using the state criminal offense was improper. To allow sentencing to be based upon a conviction of a state crime in violation of the "precise acts" limitations of the ACA and contrary to the purpose of the Sentencing Reform Act and sentencing guidelines will only ensure the imposition of unequal sentences in federal prosecutions; this is a result

[16] 14 LA Rev.Stat.Ann. § 30(c).

the sentencing guidelines were specifically enacted to prevent.

This Court, in *Mistretta v. United States*, 488 U.S. 361, 101 L.Ed.2d 714, 109 S.Ct. 649 (1989) held that the sentencing guidelines promulgated pursuant to the Sentencing Reform Act of 1984 were constitutional. The purpose of the sentencing guidelines was to ensure uniformity of sentences within a specific guideline range, thereby ensuring that there would be fairly equal sentences imposed for the same crime within the federal system. To allow a greater sentence to be imposed upon DEBRA FAYE LEWIS because she was improperly prosecuted and convicted under the Assimilative Crimes Act of a state criminal statute would thwart the purpose of the sentencing guidelines. To allow such a sentence to stand would allow upward departures from the guidelines to the prejudice of a defendant without any articulated basis for the upward departure or recourse for correction, merely because the defendant was convicted under an improperly assimilated state criminal statute rather than under the appropriate federal criminal statute.

In the case at bar, a sentence of life imprisonment without parole exceeds the maximum sentencing guideline range for the crime of federal second degree murder upon which petitioner was convicted. There is no doubt that this sentence severely prejudices petitioner's rights. This prejudice requires that the conviction and sentence under the Assimilative Crimes Act for murder under the Louisiana first degree murder statute, La.Rev.Stat. Ann. 14:30A(5) be vacated. If this Court affirms the conviction imposed by the Fifth Circuit of federal second degree murder, the sentence affirmed by the Fifth Circuit exceeds the sentencing guidelines maximum guideline for federal second degree murder. In that respect, the sentence should be vacated and the case remanded to the Fifth Circuit Court of Appeals with the instruction that the sentence of life imprisonment without parole be vacated

and that the Fifth Circuit remand this matter to the district court for resentencing.

CONCLUSION

The opinion of the Fifth Circuit Court of Appeals that petitioner was improperly convicted under the Assimilative Crimes Act of Louisiana first degree murder should be affirmed.

The subsequent conviction by the Fifth Circuit Court of Appeals of federal second degree murder based upon the invalid indictment should be reversed and vacated and the matter remanded for new trial.

In the event this Court finds that the conviction of petitioner of federal second degree murder is proper, the sentence of life imprisonment without parole should be vacated and this matter remanded to the Fifth Circuit with instructions to vacate the sentence of life imprisonment without parole and to remand the case to the district court for resentencing.

Respectfully submitted,

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No. 96-7151

In the Supreme Court of the United States

OCTOBER TERM, 1996

DEBRA FAYE LEWIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether petitioner was properly charged and convicted for the murder of her four-year-old stepdaughter under the Assimilative Crimes Act, 18 U.S.C. § 13, and the Louisiana child murder statute, 14 La. Rev. Stat. Ann. § 30A(5), and if not, whether the sentence was proper.

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OPINIONS BELOW

The opinion of the court of appeals (J.A. 64-92) is reported at 92 F.3d 1371. The opinion of the district court denying petitioner's pretrial motion to dismiss the indictment (J.A. 8-18) is reported at 848 F. Supp. 692.

JURISDICTION

The judgment of the court of appeals was entered on August 19, 1996. A petition for rehearing was denied on September 16, 1996. Pet. App. B; J.A. 93. The petition for a writ of certiorari was filed on December 16,

1996, and was granted on May 12, 1997, limited to a question framed by order of the Court (117 S. Ct. 1730). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The Assimilative Crimes Act (ACA) provides, in pertinent part, as follows:

> (a) Whoever within or upon any of the places now existing or hereafter reserved or acquired as provided in section 7 of this title, or on, above, or below any portion of the territorial sea of the United States not within the jurisdiction of any State, Commonwealth, territory, possession, or district is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.

18 U.S.C. 13(a).

The federal murder statute provides as follows:

> (a) Murder is the unlawful killing of a human being with malice aforethought. Every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing; or committed in the perpetration of, or attempt to perpetrate, any arson, escape, murder, kidnapping, treason, espionage, sabotage, aggravated sexual abuse or sexual abuse, burglary, or robbery; or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed, is murder in the first degree.
>
> Any other murder is murder in the second degree.
>
> (b) Within the special maritime and territorial jurisdiction of the United States,
>
> Whoever is guilty of murder in the first degree shall be punished by death or by imprisonment for life;
>
> Whoever is guilty of murder in the second degree, shall be imprisoned for any term of years or for life.

18 U.S.C. 1111.

The Louisiana first degree murder statute provides, in pertinent part, as follows:

> A. First degree murder is the killing of a human being:
>
> * * * * *
>
> (5) When the offender has the specific intent to kill or to inflict great bodily harm upon a victim under the age of twelve or sixty-five years of age or older.

La. Rev. Stat. Ann. § 14:30A(5).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Louisiana, petitioner was convicted of first degree murder of Jadasha D. Lowery, in violation of La. Rev. Stat. Ann. § 14:30A(5), and pursuant to the Assimilative Crimes Act, 18 U.S.C. 13, 7, and 2. Petitioner was sentenced

to life imprisonment.[1] The court of appeals affirmed the conviction and sentence. J.A. 64-92.

1. *Statutory Background*

a. Congress exercises legislative jurisdiction over federal enclaves pursuant to Article I, § 8, Cl. 17, and Article IV, § 3, Cl. 2, of the Constitution. See *United States* v. *Sharpnack*, 355 U.S. 286, 288 (1958). The first Federal Crimes Act provided for the punishment of certain serious offenses, such as murder, manslaughter, maiming, and larceny, if committed "within any fort, arsenal, dock-yard, magazine, or in any other place or district of country, under the sole and exclusive jurisdiction of the United States." Act of April 30, 1790, ch. 9, § 3, 1 Stat. 113; see also §§ 7, 13, 16, 1 Stat. 113-116. Persons committing other crimes in the federal enclaves went unpunished, however, since the States lacked jurisdiction over these areas, and the federal courts lacked common law jurisdiction. See *Williams* v. *United States*, 327 U.S. 711, 720-721 n.19 (1946); *United States* v. *Press Publishing Co.*, 219 U.S. 1, 12 (1911); *Jurisdiction over Federal Areas Within the United States, Report of the Interdepartmental Committee for the Study of Jurisdiction over Federal Areas within the States*, Pt. II, at 124-126 (1957).

Congress subsequently enacted the Federal Crimes Act of March 3, 1825, ch. 65, 4 Stat. 115, which expanded the list of enumerated federal crimes. For areas subject to exclusive federal jurisdiction, Section 3 of the 1825 Act supplemented the enumerated

[1] Co-defendant James Lewis was also convicted of first degree murder and sentenced to life imprisonment. His petition for a writ of certiorari, docketed as No. 96-7726, is currently pending.

crimes by adopting as federal criminal law the criminal laws of the State within which the federal enclave was located. *Ibid.*; see *Williams*, 327 U.S. at 720-721 & n.19; *Press Publishing*, 219 U.S. at 10-13. Section 3 of the 1825 Act, which became the basis of the present Assimilative Crimes Act, provided:

> * * * if any offence shall be committed in any [federal enclave], the punishment of which offence is not specially provided for by any law of the United States, such offence shall, upon a conviction in any court of the United States having cognisance thereof, be liable to, and receive the same punishment as the laws of the state in which such fort, dock-yard, navy-yard, arsenal, armory, or magazine, or other place, ceded as aforesaid, is situated, provide for the like offence when committed within the body of any county of such state.

4 Stat. 115.[2]

Congressman (later President) James Buchanan explained the need for that provision by observing that "a great variety of actions, to which a high degree of moral guilt is attached, and which are punished as crimes at the common law, and by every State in the Union, may be committed with impunity on the high seas, and in any place where Congress has exclusive jurisdiction." *Williams*, 327 U.S. at 720-721 n.19 (quoting 40 Annals of Congress, 17th Cong., 2d Sess. 929 (1822-1823)). In acting to redress that

[2] The Act covered offenses committed in "any fort, dock-yard, navy-yard, arsenal, armory, or magazine, the site whereof is ceded to, and under the jurisdiction of, the United States, or on the site of any lighthouse, or other needful building belonging to the United States." 4 Stat. 115.

situation, "Congress expressly adopted the fundamental policy of conformity to local law" and "made it clear that, with the exception of the enlarged list of offenses specifically proscribed by it, the federal offenses in each enclave were to be identical with those proscribed by the State in which the enclave was situated." *Sharpnack*, 355 U.S. at 290. See also *Franklin* v. *United States*, 216 U.S. 559, 568 (1910).

In *United States* v. *Paul*, 31 U.S. (6 Pet.) 141, 142 (1832), this Court construed the 1825 Act as "limited to the laws of the several states in force at the time of its enactment." Because the ACA (so construed) did not authorize the application to federal enclaves of state laws enacted after 1825, "the Act gradually lost much of its effectiveness in maintaining current conformity with state criminal laws." *Sharpnack*, 355 U.S. at 291. Congress therefore undertook periodic reenactments of the Assimilative Crimes Act to adopt the state laws in effect at the time of each reenactment. See Act of April 5, 1866, ch. 24, § 2, 14 Stat. 13; Act of July 7, 1898, ch. 576, § 2, 30 Stat. 717; Act of March 4, 1909, ch. 321, § 289, 35 Stat. 1145; Act of June 15, 1933, ch. 85, 48 Stat. 152; Act of June 20, 1935, ch. 284, 49 Stat. 394; Act of June 6, 1940, ch. 241, 54 Stat. 234. See generally *Johnson* v. *Yellow Cab Transit Co.*, 321 U.S. 383, 398-399 (1944) (Frankfurter, J., dissenting); *Franklin*, 216 U.S. at 570.[3]

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[3] In addition, the use of the term "offense" was abandoned when Congress codified the federal criminal laws in 1909. As amended in 1909, the ACA applied to any person "who shall do or omit the doing of any act or thing which is not made penal by any laws of Congress, but which" would be "penal" under state law. 35 Stat. 1145. The House Report stated that "[a]n act which is not forbidden by law and to the commission of which no penalty is attached in no legal sense can be denominated an 'offense.' The section has therefore been rewritten so as to correctly express what Congress intended when it enacted the section referred to." H.R. Rep. No. 2, 60th Cong., 1st Sess. Pt. I, at 25 (1908). See *Williams*, 327 U.S. at 722 & n. 24.

In 1948, Congress amended the ACA to make the Act applicable to offenses committed in federal enclaves under the state laws in force at the time of the alleged offense. Act of June 25, 1948, ch. 1, § 13, 62 Stat. 686. The current Act thus dispenses with the requirement for further periodic reenactment of the ACA in order to stay current with changing state criminal law. In *Sharpnack*, this Court upheld the 1948 ACA against constitutional challenge, rejecting the contention that assimilation of state laws enacted after the passage of the 1948 Act represented an improper delegation of federal authority to state officials. The Court explained that "[r]ather than being a delegation by Congress of its legislative authority to the States, it is a deliberate continuing adoption by Congress for federal enclaves of such unpre-empted offenses and punishments as shall have been already put in effect by the respective States for their own government." 355 U.S. at 294.

In its current form, the ACA applies within the "special maritime and territorial jurisdiction of the United States," as defined by 18 U.S.C. 7. That area includes, *inter alia*, "[a]ny lands reserved or acquired for the use of the United States * * * for the erection of a fort, magazine, arsenal, dockyard, or other needful building." 18 U.S.C. 7(3). Under the ACA, a person who in a federal enclave "is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State

* * *, shall be guilty of a like offense and subject to a like punishment." 18 U.S.C. 13(a).

b. The federal murder statute provides that "[m]urder is the unlawful killing of a human being with malice aforethought." 18 U.S.C. 1111(a). The statute identifies several categories of first degree murder and provides that "[a]ny other murder is murder in the second degree." *Ibid.* Like the Assimilative Crimes Act, the federal murder statute applies "[w]ithin the special maritime and territorial jurisdiction of the United States." 18 U.S.C. 1111(b). Persons convicted of first degree murder "shall be punished by death or by imprisonment for life." *Ibid.* Persons convicted of second degree murder "shall be imprisoned for any term of years or for life." *Ibid.*

c. Louisiana law establishes a variety of categories of first degree murder. The applicable statute provides, *inter alia*, that a homicide is first degree murder "[w]hen the offender has the specific intent to kill or to inflict great bodily harm upon a victim under the age of twelve years." La. Rev. Stat. Ann. § 14:30A(5). That provision was added to the Louisiana criminal code in 1985. See 1985 La. Acts, No. 515, § 1. The Louisiana statute provides for a mandatory sentence of life imprisonment if the government does not seek the death penalty. La. Rev. Stat. Ann. § 14:30C.

2. *The present proceeding*

a. Jadasha Lowery was the four-year-old daughter of James Lewis. Petitioner was her stepmother. Her death occurred in the family's home at Fort Polk, a United States military reservation, where James Lewis was stationed with the U.S. Army. J.A. 65. It is undisputed that the place at which Jadasha's death

occurred is an area within the exclusive jurisdiction of the United States. See J.A. 5-6.

Jadasha was killed at the hands of petitioner and James Lewis on December 20, 1993, as the result of repeated and severe beatings. The forensic pathologist who examined Jadasha counted more than 200 injuries on her body. Jadasha received most of those injuries within 24 hours of her death, although raw sores, lacerations, and callouses on her body evidenced chronic and repetitive injuries. J.A. 65, 83-85.

Petitioner and James Lewis admitted that they had beaten Jadasha numerous times within the 24-hour period before her death. James Lewis shook the little girl and beat her with his hand or a fly swatter. Petitioner beat Jadasha with a fly swatter, hit her across the face with a coat hanger, and also used switches to whip the child. Because the three spent the day of Jadasha's death together, petitioner and James Lewis were each aware of the beatings administered by the other. Indeed, once during the day, the little girl ran into her room following a beating by James Lewis—only to have petitioner summon her again for another round of beatings by her father. J.A. 83.

Investigators at the crime scene found blood throughout the house. Blood was present on the floor of the living room, on the floor in Jadasha's room, on the sofa, window curtain, closet doors in the hallway, master bedroom closet, on the walls, on clothing, on blankets. Blood was found on pieces of a curtain rod found crumpled in the Lewises' garbage can. One blood spot on the wall looked like a child's smeared hand print. J.A. 84.

The pathologist testified that Jadasha had died of a cerebral edema—a swelling of the brain that ulti-

mately causes respiratory functions to cease—caused by a blow to the head. He conservatively counted nine head injuries, any one of which was sufficient to cause death. He testified that such a blow was the equivalent of dropping a child on her head from more than three feet onto an uncarpeted floor. J.A. 65, 84-85. Jadasha also suffered massive hemorrhaging, losing one- to two-thirds of her entire blood volume from her circulatory system, which was redirected into the tissues underlying her injuries. The pathologist testified that the hemorrhaging could have eventually caused the girl's death if the head injuries had not killed her first. J.A. 85.

Neighbors and friends described a history of child abuse by petitioner and James Lewis. One had observed injuries on Jadasha on several occasions, including a large black eye and burst lip. Another testified that petitioner had withheld food from Jadasha for three days and had bathed the little girl in bleach. Others recalled observing signs of injury and abuse, including a burn on Jadasha's ear caused by hot liquid. A few remembered hearing petitioner state that "if she didn't stop whipping Jadasha she would hurt her or kill her," and that "she was going to let James whip [Jadasha because] [s]he wasn't going to go to jail for killing that child." J.A. 85-86.

b. The indictment in this case charged petitioner and James Lewis with first degree murder under Louisiana law pursuant to the ACA. See J.A. 3-4.[4]

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[4] The indictment charged that petitioner and her co-defendant "did, with specific intent to inflict great bodily harm, commit first degree murder of Jadasha D. Lowery, a human being under the age of twelve years, in violation of Title 14, Louisiana Revised Statutes Annotated, Section [30A(5)], * * * in violation of Title 18, United States Code, Sections 7, 13 and 2." J.A. 3-4.

Before trial, petitioner filed a motion to dismiss the indictment. See J.A. 5-7. She argued that the federal murder statute, 18 U.S.C. 1111, provides for the specific crime of first degree murder, and that the assimilation of the Louisiana murder statute under the ACA was therefore improper. See J.A. 6-7.

The district court denied the motion, holding that petitioner was subject to prosecution under the Louisiana statute. J.A. 8-18. The court acknowledged that "the acts with which [petitioner is] charged could be punishable under the federal murder statute." J.A. 15. It concluded, however, that petitioner was

> being prosecuted in this case under a state statute designed to punish specific conduct of a different character than that proscribed in the federal murder statute. The state statute is specifically designed to provide a deterrent to child abuse, a subject which is not addressed by federal law.

Ibid. The court held on that basis that "the use of the ACA is proper and [petitioner's] motion to dismiss will be denied." J.A. 18.

c. Petitioner and her co-defendant were tried before a jury on the assimilated state charge of first degree murder under La. Rev. Stat. Ann. § 14:30A(5). The district court instructed the jury that it could convict petitioner on that charge only if it found beyond a reasonable doubt that (1) petitioner "killed Jadasha Lowery," (2) petitioner "acted with specific intent to kill or inflict great bodily harm," and (3) "[t]he victim was under twelve years of age." J.A. 31.

The jury found petitioner guilty of that offense. J.A. 37.

Following her conviction, petitioner was sentenced to life imprisonment under the federal Sentencing Guidelines. See J.A. 48. She was assigned a base offense level of 43, pursuant to the Guideline for first degree murder, § 2A1.1. She was given two additional points under Guidelines § 3A1.1 (vulnerable victim), for a final offense level of 45. See J.A. 48-51. She was placed in Criminal History Category I. J.A. 48. The resulting Guidelines sentence was life imprisonment. *Ibid.* The district court sentenced petitioner to life imprisonment. J.A. 58.

d. The court of appeals affirmed petitioner's conviction and sentence. J.A. 64-92.

The court of appeals first held that petitioner should have been charged under the federal murder statute rather than the Louisiana murder statute and the Assimilative Crimes Act. J.A. 66-75. The court asserted that the ACA "fills in gaps existing in federal statutes regarding criminal law," but that "where Congress has enacted legislation criminalizing conduct on the enclaves, the federal statutes preempt the state laws regarding those crimes." J.A. 67. In the view of the court of appeals, no "gap" in federal law existed because the conduct at issue was proscribed by 18 U.S.C. 1111. J.A. 71. The court concluded that "the federal murder statute preempts the Louisiana first degree murder statute because the killing of a human being is punishable under the federal statute and because the nature of the crime 'murder of a child' does not differ substantially from the nature and theory of murder in general." J.A. 75.

The court held, however, that the government's reliance on the Assimilative Crimes Act did not require reversal of petitioner's conviction. The court observed that "malice aforethought" under 18 U.S.C. 1111(a) may be established by, *inter alia*, proof of "intent to do serious bodily injury." J.A. 78 n.11. The court then explained:

> The basic elements are the same for second degree murder under 18 U.S.C. § 1111(a) and first degree murder under La. Rev. Stat. § 14:30A(5). Both statutes require proof of specific intent and the killing of a human being. Regarding intent, 18 U.S.C. § 1111 requires proof of "specific intent to inflict serious bodily injury," and La. Rev. Stat. § 14:30A(5) requires proof of "specific intent to inflict great bodily harm." * * * Though labeled somewhat differently, "intent to inflict serious bodily injury" and "intent to inflict great bodily harm" represent parallel intents for purposes of evaluating these murder statutes.

J.A. 77-78 (footnote omitted). Based on the statutory elements of the state and federal crimes, and the instructions given to the jury at petitioner's trial, the court of appeals concluded that the elements of second degree murder under 18 U.S.C. 1111(a) had been proved by the government and found by the jury. J.A. 78-80.

The court of appeals also concluded that a remand for resentencing was unnecessary. The court stated that "[r]esentencing is only required where the district court has imposed a sentence that exceeded the maximum sentence that the defendant would have received if sentenced under the applicable federal statute." J.A. 80. The court observed that petitioner "did not receive a sentence exceeding the maximum sentence allowed under the federal murder statute,"

because federal law provides that persons convicted of second degree murder may be imprisoned "for any term of years or for life." *Ibid.* (quoting 18 U.S.C. 1111(b)). The court of appeals concluded on that basis that it "need [not] remand for resentencing." J.A. 80; see Pet. App. 17.[5]

SUMMARY OF ARGUMENT

1. Petitioner was properly charged and convicted under the Assimilative Crimes Act and the Louisiana child murder statute. The fact that petitioner's conduct could have been prosecuted under the federal murder statute does not make use of the ACA improper. Rather, the crucial question in this case is whether Congress has focused directly on the appropriate sanction for the specific class of conduct—murder of a child under 12—that constitutes the state offense.

That approach is consistent with this Court's decisions and ensures that Louisiana law will apply throughout the State unless it is in conflict with a considered congressional policy judgment regarding

[5] The court of appeals also rejected petitioner's challenge to the sufficiency of the evidence and to the admission into evidence of certain photographs and of petitioner's own statements to investigators. J.A. 81-91. In addition, the court rejected petitioner's contention that Battered Women's Syndrome "diminished her capacity to develop specific intent to kill or inflict great bodily harm on Jadasha." J.A. 91. The court explained that the record contained sufficient evidence that petitioner acted with the requisite intent; that the jury "heard and evaluated the testimony regarding Battered Women's Syndrome" and "chose not to believe that the Syndrome affected her ability to develop the intent necessary to commit murder"; and that there was "no basis in the record to disturb the jury's credibility choices." *Ibid.*

the proper administration of federal enclaves. Where Congress has directly addressed the precise acts that constitute the state offense, its judgment as to the appropriate sanction for that conduct must take precedence over the conflicting judgment of the State. But where Congress has not addressed the relevant conduct at the same level of specificity as the State, prosecution under the ACA should not be foreclosed by the existence of a more general federal statute that subsumes the offense in question.

When it enacted the federal murder statute in 1909, Congress simply codified what was at that time the prevailing definition of murder in the large majority of States. Congress did not consider and reject an existing state practice of treating the murder of children as a particularly serious crime. Since that time, Congress has not addressed the subject of child murder in any precise, direct, or focused manner, either by enacting a child murder provision or by making a considered determination that the age of a murder victim is irrelevant to the seriousness of the offense. The Louisiana child murder statute does not conflict with any federal policy reflected in 18 U.S.C. 1111, and petitioner was properly convicted of the assimilated state offense.

2. If this Court holds that the assimilation of Louisiana law was improper, the case should be remanded for resentencing for the federal offense of second degree murder. In finding petitioner guilty on the Louisiana child murder charge, the jury necessarily found all of the elements of second degree murder under 18 U.S.C. 1111(a). Entry of a judgment of conviction for that offense would therefore be the appropriate remedy if this Court holds that the existence of the federal murder statute precluded reliance on the

ACA. The court of appeals erred, however, in concluding that resentencing was unnecessary simply because the terms of imprisonment imposed by the district court fell within the statutory maximum sentence for second degree murder under federal law. Rather, petitioner should be resentenced under the Sentencing Guidelines if this Court vacates her conviction on the assimilated state offense and orders entry of a judgment of conviction for second degree murder under 18 U.S.C. 1111(a).

ARGUMENT

I. PETITIONER WAS PROPERLY CHARGED AND CONVICTED UNDER THE ASSIMILATIVE CRIMES ACT AND THE LOUISIANA CHILD MURDER STATUTE

Conduct occurring on federal enclaves is subject to two distinct bodies of criminal law. First, a number of substantive criminal statutes define and punish offenses committed "within the special maritime and territorial jurisdiction of the United States." See, *e.g.*, 18 U.S.C. 81 (arson); 18 U.S.C. 113 (assault); 18 U.S.C. 1111 (murder); 18 U.S.C. 1201(a)(2) (kidnapping). Second, Congress has enacted the Assimilative Crimes Act, the purpose and effect of which is "to incorporate the criminal laws of the several States * * * into the statute and to make such criminal laws to the extent of such incorporation laws of the United States." *United States* v. *Press Publishing Co.*, 219 U.S. 1, 8 (1911); see also *id.* at 10 (under the ACA, assimilated state-law crime is "punished as an offense against the United States"). With predecessors dating from 1825, the ACA reflects a longstanding federal policy that acts occurring on federal enclaves should ordinarily be governed by the same legal rules,

and subject to the same punishments, as comparable acts occurring in other areas of the State in which the enclave is located. See *United States* v. *Sharpnack*, 355 U.S. 286, 293 (1958) ("The basic legislative decision made by Congress is its decision to conform the laws in the enclaves to the local laws as to all offenses not punishable by any enactment of Congress.").

At issue in this case is the manner in which those two bodies of federal criminal law are appropriately harmonized. The ACA authorizes federal prosecution where an "act or omission" on a federal enclave, "although not made punishable by any enactment of Congress," would have violated the law of the State in which the enclave is located. 18 U.S.C. 13(a). In our view, a state offense is "made punishable" by an Act of Congress for purposes of the ACA only when a substantive federal statute focuses directly on the specific class of conduct that constitutes the state offense.[6]

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[6] The statute's current wording does not clearly indicate that it is a prerequisite for conviction under the ACA that an act is not "made punishable" under another federal statute. See 18 U.S.C. 13(a) (ACA applies to person who "is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State"). This Court has stated, however, that the Act in its current form "expressly limits the assimilation to acts or omissions committed within a federal enclave and 'not made punishable by any enactment of Congress.'" *Sharpnack*, 355 U.S. at 292. And earlier versions of the ACA have unambiguously provided that assimilation of a state-law offense is improper if that offense has been defined and prohibited by an Act of Congress. See, *e.g.*, Act of March 3, 1825, ch. 65, § 3, 4 Stat. 115 (authorizing assimilation of any state-law offense "the punishment of which

Louisiana has made the murder of a child, with specific intent either to kill or to cause serious bodily injury, a separate and distinct crime, punishable as first degree murder. La. Rev. Stat. Ann. § 14:30A(5). The passage of the Louisiana child murder statute reflects the State's view that "[c]hildren * * * are in the category of persons needing special protection." *Louisiana* v. *Weiland*, 505 So.2d 702, 709 & n.31 (La. 1987). Congress has enacted no law addressed specifically to the murder of children. Nor does the history of the federal murder statute reveal any deliberate congressional rejection of the judgment, embodied in La. Rev. Stat. Ann. § 14:30A(5), that the murder of children is a particularly serious offense. Because the Louisiana child murder statute is not displaced by any conflicting federal law that focuses directly on that conduct, the ACA authorizes a federal prosecution that assimilates the Louisiana child murder law.

A. The Phrase "Act Or Omission" In The ACA Refers To The State Law Offense That Supports An ACA Charge

1. This Court's most thorough discussion of the ACA is contained in *Williams* v. *United States*, 327 U.S. 711 (1946). The defendant in that case was charged with having sexual intercourse with a female between the ages of 16 and 18 in Indian country. 327

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offence is not specifically provided for by any law of the United States"); Act of June 6, 1940, ch. 241, 54 Stat. 234 (authorizing ACA prosecution of any person who "shall do or omit the doing of any act or thing which is not made penal by any laws of Congress, but which * * * would be penal" under state law). The Reviser's Notes accompanying the 1948 revision stated that no substantive change was intended. See 18 U.S.C. 13 note ("Minor changes were made in phraseology.").

U.S. at 713. He was convicted of statutory rape, pursuant to the ACA, under an Arizona statute that set the age of consent at 18. See *id.* at 713, 715-716. At the time of the prosecution and conviction, Acts of Congress applicable to federal enclaves defined the separate crimes of rape, assault with intent to commit rape, adultery, and fornication. *Id.* at 713-714 & nn. 4-5, 7-8. The Arizona statute defined the offense of rape to include "an act of sexual intercourse accomplished with a female, not the wife of the perpetrator, * * * [w]here the female is under the age of eighteen [18] years." 327 U.S. at 716 n.11. Because the Arizona statute applied only if the victim was "not the wife of the perpetrator," any act violative of the state law would have constituted either adultery or fornication under the federal statutes then in effect. See *id.* at 714 nn. 7 & 8. Federal law also defined the offense of having carnal knowledge of a girl (*i.e.*, statutory rape), but the statute applied only if the girl was less than 16 years old. *Id.* at 714 & n.6. This Court held that the Arizona statutory rape provision, with its higher age of consent, could not be assimilated under the ACA, see *id.* at 717-725.

In explaining its conclusion that assimilation of the state law was improper, the Court stated:

> the [ACA] does not make the Arizona statute applicable in the present case because (1) the precise acts upon which the conviction depends have been made penal by the laws of Congress defining adultery and (2) the offense known to Arizona as that of "statutory rape" has been defined and prohibited by the Federal Criminal Code, and is not to be redefined and enlarged by application to it of the [ACA].

327 U.S. at 717 (footnotes omitted). "The fact that the definition of this offense as enacted by Congress results in a narrower scope for the offense than that given to it by the State," the Court stated, "does not mean that the Congressional definition must give way to the State definition," *id.* at 717-718, because "a conflicting State definition does not enlarge the scope of the offense defined by Congress," *id.* at 718. In the area of sexual offenses, the Court explained, Congress had "covered the field with uniform legislation affecting areas within the jurisdiction of Congress." *Id.* at 724. And in drafting the carnal knowledge statute in particular, Congress had given "special attention to the age of consent." *Ibid.* The Court therefore held that the Arizona statutory rape law could not be applied to the federal enclave under the ACA. *Id.* at 725.

The Court in *Williams* did not rest its holding simply on the fact that the Arizona statutory rape law covered conduct that would be subject to prosecution under federal adultery or fornication statutes. Rather, after noting that Congress had made penal the "precise acts" on which conviction depended, 327 U.S. at 717, the court went on to examine at length the specific relationship between state and federal law, *id.* at 717-725. By its analysis, the Court thus rejected any view that acts that constitute a state crime are "made punishable by any enactment of Congress" for purposes of the ACA simply because it might be possible to prosecute the general conduct at issue under some federal criminal law.

2. The approach taken in *Williams* is consistent with the ACA's history. Before the codification of the federal criminal laws in 1909, the ACA provided that

> when any offense is committed in any place [under the exclusive jurisdiction of the United States], the punishment for which offense is not provided for by any law of the United States, the person committing such offense shall * * * be liable to and receive the same punishment as the laws of the State in which such place is situated now provide for the like offense when committed within the jurisdiction of such State * * *.

Act of July 7, 1898, ch. 576, § 2, 30 Stat. 717; see also *Williams* v. *United States*, 327 U.S. at 722 n.23 (quoting Rev. Stat. § 5391 (1878)). As codified in 1909, the Act applied to any person "who shall do or omit the doing of any act or thing which is not made penal by any laws of Congress, but which * * * would be penal" under state law. Act of March 4, 1909, ch. 321, § 289, 35 Stat. 1145. The congressional report accompanying the 1909 codification did not suggest that substitution of the phrase "act or thing" for the word "offense" was intended to alter the scope of the statute's coverage. Rather, the report stated that "[a]n act which is not forbidden by law and to the commission of which no penalty is attached in no legal sense can be denominated an 'offense.' The section has therefore been rewritten so as to correctly express what Congress intended when it enacted the section referred to." H.R. Rep. No. 2, 60th Cong., 1st Sess. Pt. I, at 25 (1908) (quoted in *Williams*, 327 U.S. at 722-723 n.24).

The Court in *Williams* acknowledged that use of the phrase "act or thing" in the 1909 codification may have led courts or litigants "to interpret it in a specific sense as referring to individual acts of the parties rather than in a generic sense referring to

acts of a general type or kind." 327 U.S. at 722. The Court observed, however, that "the expressed purpose of the Committee [was] to continue, rather than to change, [t] e Act's] original meaning." *Id.* at 723. Thus, the ACA in its current form—like the pre-1909 version—should be read to apply when the state law *offense* that forms the basis for a federal charge under the ACA has not separately been "made punishable" as a federal crime.

3. To treat the ACA as inapplicable whenever the defendant's primary conduct happens to violate some federal law would produce incongruous results and would undermine the effectuation of the statutory purposes. Under that approach, for example, petitioner's conviction on the assimilated state charge in this case would have been improper even if there were no federal murder statute, since her conduct would have constituted assault under federal law. See 18 U.S.C. 113. More generally, there is no sound reason that Congress would have intended to preclude the adoption of a state criminal provision for crimes on enclaves simply because the defendant's conduct fortuitously violates a federal law directed at a different evil. That approach would (albeit in somewhat less stark form) reintroduce the problem that precipitated the initial passage of the ACA—*i.e.*, the danger that an individual who commits what would otherwise be a state law offense on a federal enclave might escape appropriate punishment because state officials lack jurisdiction and Congress has not focused its attention on the offense in question. See pages 4-5, *supra*.

4. The courts of appeals have repeatedly sustained convictions for assimilated state crimes under the ACA, even where the defendant's conduct would also

have been subject to prosecution under a federal criminal statute.[7] The decisions most closely on point have recognized, in particular, that state laws prohibiting the abuse of children may properly be applied in federal enclaves under the Assimilative Crimes Act, even where the conduct at issue is also violative of a more general federal law.[8] Indeed, petitioner concedes that "the government could have prosecuted the defendant under the federal second degree murder statute and assimilated the state

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[7] See, *e.g.*, *United States* v. *Sasnett*, 925 F.2d 392, 396 (11th Cir. 1991) (offense of causing death while driving under the influence of alcohol was properly prosecuted under state law through the ACA even though defendant's conduct was also covered by federal involuntary manslaughter statute; state law was "designed to punish specific conduct which is not specifically addressed by federal law"); *United States* v. *Kaufman*, 862 F.2d 236, 237-238 (9th Cir. 1988) (per curiam) (ACA prosecution was brought under an assimilated Oregon law that prohibited pointing a loaded or unloaded firearm at another; the court held that the ACA charge was proper even though defendant might have been prosecuted under federal assault statute); *United States* v. *Vaughan*, 682 F.2d 290, 293 (2d Cir. 1982) (ACA prosecution properly brought for second degree burglary, even though defendant could have been prosecuted under federal assault and larceny statutes); *Fields* v. *United States*, 432 F.2d 205, 207-208 (2d Cir.) (assimilation of state malicious shooting statute was proper even though acts committed were criminal under federal assault statute), cert. denied, 403 U.S. 907 (1971).

[8] See *United States* v. *Brown*, 608 F.2d 551, 553-554 (5th Cir. 1979) (assimilation under ACA of Texas child abuse statute was proper even though conduct was also covered by federal assault statute); *United States* v. *Fesler*, 781 F.2d 384, 390-391 (5th Cir.) (affirming conviction under assimilated Texas child abuse statute for conduct covered by federal involuntary manslaughter statute), cert. denied, 476 U.S. 1118 (1986).

cruelty to juveniles statute as a separate charge had it so desired," Pet. Br. 18, and thereby acknowledges that a state law offense may be prosecuted under the ACA even where the general conduct also violates a federal statute.

B. The Offense Of Child Murder Under Louisiana Law Is Not "Made Punishable" By The Federal Murder Statute

The crucial question in this case is whether child murder, as defined by Louisiana law, is an offense "made punishable by any enactment of Congress." 18 U.S.C. 13(a). The indictment in this case alleged that petitioner "did, with specific intent to inflict great bodily harm, commit first degree murder of Jadasha D. Lowery, a human being under the age of twelve years, in violation of Title 14, Louisiana Revised Statutes Annotated, Section [30A(5)]." J.A. 3. The district court instructed the jury that the elements of the charged offense were that (1) petitioner "killed Jadasha Lowery," (2) petitioner "acted with specific intent to kill or inflict great bodily harm," and (3) "[t]he victim was under twelve years of age." J.A. 31. Thus, the "offense" with which petitioner was charged and convicted was child murder—a subcategory of first degree murder as defined by Louisiana law.

Viewed under the correct standard, that assimilated state offense would be "made punishable" by an Act of Congress only if Congress has focused directly in federal criminal law on the appropriate sanction for the specific class of conduct—murder of a child under 12—that constitutes the state offense. That approach is consistent with this Court's decisions and furthers the purposes of the ACA by ensuring that Louisiana criminal law will be enforceable throughout the State

except when it conflicts with a considered congressional policy judgment regarding the proper administration of federal enclaves. In this case, no such conflict exists: although Congress has addressed the general subject of murder in federal enclaves, it has not directed its attention to the murder of children.

1. As this Court has recognized, the Assimilative Crimes Act must be construed in light of Congress's intent to minimize disparities between the criminal laws applicable to federal enclaves and those that govern the surrounding areas. Thus, the Court has observed that

> Congress, in adopting [the ACA], sedulously considered the two-fold character of our constitutional government, and had in view the enlightened purpose, so far as the punishment of crime was concerned, to interfere as little as might be with the authority of the States on that subject over all territory situated within their exterior boundaries, and which hence would be subject to exclusive state jurisdiction but for the existence of a United States reservation.

United States v. *Press Publishing Co.*, 219 U.S. 1, 9 (1911). With the ACA, this Court has recognized, "Congress has * * * provided that within each federal enclave, to the extent that offenses are not preempted by congressional enactments, there shall be complete current conformity with the criminal laws of the respective States in which the enclaves are situated." *United States* v. *Sharpnack*, 355 U.S. 286, 293 (1958); see also *id.* at 294 (ACA "is a practical accommodation of the mechanics of the legislative functions of State and Nation in the field of police power where it is especially appropriate to make the

federal regulation of local conduct conform to that already established by the State"). "The basic legislative decision made by Congress is its decision to conform the laws in the enclaves to the local laws as to all offenses not punishable by any enactment of Congress." *Id.* at 296.

In view of the ACA's policy of conformity to state criminal law on federal enclaves, the applicability of the Act should give way only when the state law sought to be assimilated conflicts directly with federal policy as reflected in substantive criminal statutes. Where Congress has directly addressed the specific class of conduct that constitutes the state offense, assimilation of a state criminal law pursuant to the ACA is either superfluous (if Congress has defined and punished the offense in precisely the same manner as the State) or inconsistent with federal policy. But where Congress has not addressed the relevant conduct at the same level of specificity as the State, no such conflict exists. Assimilation of the state offense should not be precluded by the existence of a more general federal statute that subsumes the offense in question.

The courts of appeals have often phrased the test as whether the "precise act" proscribed by state law is also the subject of a federal prohibition. See, *e.g.*, *United States* v. *Brown*, 608 F.2d 551, 554 (5th Cir. 1979) ("Although the acts with which the defendant was charged could be punishable under the federal assault statute, the 'precise act' of injury to a child is not proscribed by federal law."); *United States* v. *Minger*, 976 F.2d 185, 189 (4th Cir. 1992); *United States* v. *Sasnett*, 925 F.2d 392, 396 (11th Cir. 1991); *United States* v. *Kaufman*, 862 F.2d 236, 237-238 (9th Cir. 1988); *Fields* v. *United States*, 438 F.2d 205, 208

(2d Cir.), cert. denied, 403 U.S. 907 (1971). The "precise act" test, as developed in the lower courts, focuses on whether Congress has spoken directly to the specific class of conduct that constitutes the state offense.[9]

Properly understood, the precise act test is a means of determining whether the state law sought to be assimilated conflicts with any clearly articulated congressional policy choice. Where a substantive federal criminal statute directly addresses the "precise act" that constitutes the state offense, and prescribes a different sanction than does state law, use of the ACA would have the practical effect of permitting the State's policy judgment to supersede that of Congress. Under those circumstances, Congress's determination regarding the appropriate administration of federal enclaves must override the desire for uniform application of criminal laws throughout a State. Where Congress has addressed the relevant conduct only at a higher level of generality, however, there is no precisely focused federal policy judgment with which the state law can be said to conflict. Under those circumstances, assimilation of state law furthers the purposes of the ACA by ensuring that federal legislation "interfere[s] as little as might be with the authority of the States" regarding the definition and punishment of crimes committed within their borders. *Press Publishing*, 219 U.S. at 9.

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[9] The phrase "precise act" bears a different meaning in this context than in *Williams*, since the Court in *Williams* used that phrase in noting that the defendant's particular conduct was covered by federal law; the Court did not define the "precise act" by reference to state law. See 327 U.S. at 717 (noting that "the precise acts upon which the conviction depends have been made penal by the laws of Congress defining adultery").

That conclusion is consistent with the approach taken in *Williams*. The crux of the Court's analysis was its determination that the state and federal statutes contained "conflicting" definitions of the same offense. 327 U.S. at 718. In reaching that conclusion, the Court attached significance to the fact that Congress in enacting the carnal knowledge statute "gave special attention to the age of consent," and adopted a standard inconsistent with that adopted by Arizona. *Id.* at 724; see also *id.* at 725 n.29 (noting Congress's awareness that the age of consent in the federal law was lower than that employed by some States).[10]

[10] As the *Williams* Court noted, the government did not defend the court of appeals' judgment affirming Williams' conviction. See 327 U.S. at 719. In its brief to this Court in *Williams*, the government stated that assimilation of the Arizona offense would have been appropriate if Congress, in enacting the federal carnal knowledge statute, had intended only to "set the age of sixteen as the minimum, but not the maximum, age of consent for all areas of federal jurisdiction." Gov't Br. 19 (O.T. 1945, No. 123). To construe the carnal knowledge statute in that fashion, the government acknowledged, would "obviate[] the anomaly whereby an act committed in the state of Arizona is criminal or innocent depending upon whether it took place on one side of the boundary line of the Indian Reservation or the other," and it would "minimize[] the area of possible conflict between the policies of the federal and the state governments." *Id.* at 19-20. The government concluded, however, that

> [i]n respect of the carnal knowledge statute, we know that Congress gave careful consideration to the problem of fixing an age of consent and that it recognized that the age which it fixed differed from the age adopted by some of the states. It is evident that by fixing the age at sixteen Congress not only provided that girls under sixteen were incapable of consenting to the proscribed acts, but inferentially Congress regarded girls sixteen or over as being capable of intelligently consenting to the acts in question.

Gov't Br. 20 (O.T. 1945, No. 123). Thus, the government's conclusion that the federal carnal knowledge statute "conflict[ed] with local policy" (*id.* at 21), was based on the fact that Congress had deliberately chosen an age of consent at variance with the laws of some States.

Williams thus establishes that the general applicability of the ACA yields when Congress has made a conflicting policy choice on the definition of the precise conduct that constitutes the crime. See also *United States* v. *Sharpnack*, 355 U.S. at 296 & n.9 (noting that the ACA broadly adopts local law "because the laws are already in force throughout the state in which the enclave is located," but declining to "pass upon the effect of the [ACA] where an assimilated state law conflicts with a specific federal criminal statute. Cf. *Williams* v. *United States*.").

2. Thus, the dispositive issue in this case is whether the provisions of 18 U.S.C. 1111(a) reflect a considered congressional determination that the age of a murder victim has no bearing on the seriousness of the offense, so as to create a conflict with Louisiana law. The answer to that question is no. The history of the federal murder statute does not suggest that Congress considered and rejected the view that murder of a youthful victim is more reprehensible than murder of an adult. Rather, Congress simply codified what was at that time the prevailing definition of murder as reflected in the large majority of state criminal codes. Because Congress has not addressed the subject of child murder in any direct or focused manner—either by enacting a federal child murder provision, or by making a considered deter-

mination that the age of a murder victim should not be relevant in assessing the severity of the crime—the offense of which petitioner was convicted is not "made punishable by any enactment of Congress." 18 U.S.C. 13(a).[11]

The federal murder statute was first codified in 1909 as part of a general revision and codification of federal statutes. See H.R. Rep. No. 2, 60th Cong., 1st Sess. Pt. I, at 12 (1908). Before that time, there was no federal statutory definition of the crimes of murder or manslaughter. Rather, Revised Statutes § 5339 (1878) simply provided that whoever "[w]ithin any fort, arsenal, dock-yard, magazine, or in any other place or district of country under the exclusive jurisdiction of the United States * * * maliciously strikes, stabs, wounds, poisons, or shoots at any other person, of which striking, stabbing, wounding, poisoning, or shooting such other person dies, either on land or at sea, within or without the United States, shall

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[11] Both *Williams* and this case involved general federal statutes—here, Section 1111(a); there, the federal adultery law—that encompassed the defendant's conduct. In each case, a State had determined that conduct falling within the general federal prohibition was particularly blameworthy if the victim was especially young. (As noted above, see page 19, *supra*, any act violative of the Arizona statutory rape law at issue in *Williams* would also have violated the federal adultery or fornication law.) The crucial difference between the cases is that in *Williams*, Congress had directly addressed the question whether (and under what circumstances) the youth of the victim warranted an additional criminal sanction, and had resolved that question in a manner inconsistent with the judgment of the State. As we explain in text, Congress has not similarly focused its attention on the question whether murder of a child is properly treated as a particularly serious crime.

suffer death."[12] In the 1909 codification of the federal criminal laws, Congress for the first time defined murder:

> Murder is the unlawful killing of a human being with malice aforethought. Every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing; or committed in the perpetration of, or attempt to perpetrate, any arson, rape, burglary, or robbery; or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed, is murder in the first degree. Any other murder is murder in the second degree.

Act of March 4, 1909, ch. 321, § 273, 35 Stat. 1143.

The special commission appointed in 1897 to revise and codify the federal criminal and penal laws explained that virtually all the States had statutes defining homicide with malice and premeditation as murder in the first degree; homicide with malice, but without premeditation, as murder in the second degree; and homicide without malice or premeditation as manslaughter.[13] The Commission stated that

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[12] Section 5339 had its origin in the first Federal Crimes Act, which provided: "[I]f any person or persons shall, within any fort, arsenal, dock-yard, magazine, or in any other place or district of country, under the sole and exclusive jurisdiction of the United States, commit the crime of wilful murder, such person or persons on being thereof convicted shall suffer death." Act of April 30, 1790, ch. 9, § 3, 1 Stat. 113; see *United States* v. *Kaiser*, 545 F.2d 467, 478 (5th Cir. 1977) (Ainsworth, J., dissenting).

[13] The States' demarcation of murder into first and second degree reflected the States' desire to ameliorate the harsh common law rule imposing a mandatory death sentence on all

"[t]hese lines of demarcation have been observed in the sections which we here submit." 1 *Final Report of the Commission to Revise and Codify the Laws of the United States* 130 (1908). The House Report likewise explained that the definition of murder then adopted was "similar in terms to the statutes defining murder in a large majority of the States." H.R. Rep. No. 2, *supra*, at 24.

Thus, in codifying and defining the federal crime of murder, Congress simply adopted the definition then prevailing in the great majority of the States. Section 1111(a) continues substantially to incorporate the definition of murder that prevailed in 1909.[14] Congress was not (and did not perceive itself to be) forging new law. Congress did not, in particular, consider and reject an existing state practice of treating the murder of children as a particularly serious crime.

The various state criminal codes reflect a diverse array of developing legislative judgments regarding the categories of murder that should be treated as particularly culpable. If the federal murder statute is regarded as "occupying the field," those state legislative judgments will have no force or effect with respect to conduct occurring on federal enclaves. That result would undermine the ACA's purpose of "maintaining current conformity with state criminal laws," *Sharpnack*, 355 U.S. at 291, in locations subject to exclusive federal jurisdiction. That result should not be reached here. Because the Louisiana child murder statute does not conflict with any federal policy reflected in 18 U.S.C. 1111, petitioner was properly convicted of the assimilated state offense.[15]

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convicted murderers. See *Woodson* v. *North Carolina*, 428 U.S. 280, 289 (1976); *Gregg* v. *Georgia*, 428 U.S. 153, 176-177 (1976); *McGautha* v. *California*, 402 U.S. 183, 198 (1971). Pennsylvania had led the way with its 1794 abolishment of capital punishment except for "murder of the first degree," which was defined to include all "willful, deliberate and premeditated" killings. The other States gradually followed suit. *McGautha*, 402 U.S. at 198; *Woodson*, 428 U.S. at 290; *Davis* v. *People of Territory of Utah*, 151 U.S. 262, 330 (1894).

[14] The definition of murder contained in the federal criminal code has remained largely unchanged since its enactment in 1909. As part of the Comprehensive Crime Control Act of 1984, Congress amended Section 1111(a)'s definition of first degree murder by adding to the enumerated four felony murder offenses the offenses of escape, murder, kidnaping, treason, espionage, and sabotage. Act of October 12, 1984, Pub. L. No. 98-473, Title II, § 1004, 98 Stat. 2138. In 1986, as part of the Criminal Law and Procedure Technical Amendments Act of 1986, Congress struck out "rape" and in its place inserted "aggravated sexual abuse or sexual abuse." Act of November 14, 1986, Pub. L. No. 99-654, § 87(c)(4), 100 Stat. 3623. The same change was also effected by the Sexual Abuse Act of 1986, Pub. L. No. 99-654, 100 Stat. 3660.

[15] Because petitioner was properly tried and convicted pursuant to the Louisiana child murder statute and the ACA, her sentence of life imprisonment was consistent with—indeed, dictated by—applicable law. The Assimilative Crimes Act provides that a person who commits a state crime on a federal enclave "shall be guilty of a like offense and subject to a like punishment." 18 U.S.C. 13(a). In sentencing a defendant convicted of an assimilated state crime, a court generally applies the Sentencing Guidelines provisions applicable to the most closely analogous federal crime. State law, however, establishes both the minimum and maximum penalties to which the defendant may be exposed. See *United States* v. *Pierce*, 75 F.3d 171, 176 (4th Cir. 1996); *United States* v. *Garcia*, 893 F.2d 250, 254 (10th Cir. 1989), cert. denied, 494 U.S. 1070 (1990); *United States* v. *Leake*, 908 F.2d 550, 553 (9th Cir. 1990); *United States* v. *Marmolejo*, 915 F.2d 981, 984 (5th Cir. 1990). The Louisiana first degree murder statute provides for a manda-

II. IF THIS COURT HOLDS THAT THE ASSIMILATION OF LOUISIANA LAW WAS IMPROPER, THE CASE SHOULD BE REMANDED FOR RESENTENCING FOR THE FEDERAL OFFENSE OF SECOND DEGREE MURDER

If this Court holds that assimilation of the Louisiana child murder statute was improper, this case should be remanded for resentencing on the federal offense of second degree murder. Because the essential elements of federal second degree murder were proved at trial and found by the jury, the district court may properly enter a judgment of conviction under 18 U.S.C. 1111(a) if that statute is held to render the ACA inapplicable. The court of appeals erred, however, in holding that petitioner's sentence of life imprisonment could be affirmed on the ground that it fell within the statutory maximum sentence for second degree murder under federal law. Rather, petitioner should be resentenced under the Guidelines provisions applicable to second degree murder.

A. "Where the government wrongfully secures a conviction under a state statute pursuant to the Assimilative Crimes Act, rather than under the relevant federal statute, the appropriate remedy is not a reversal of the conviction, but rather a vacating of the sentence and a remand to the district court for resentencing" on the federal offense. *United States* v. *Word*, 519 F.2d 612, 618 (8th Cir.), cert. denied, 423 U.S. 934 (1975). Accord *United States* v. *Hall*, 979

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tory life sentence if the government does not seek the death penalty. La. Rev. Stat. Ann. § 14:30C. The United States did not seek the death penalty in this case. The district court was therefore required to sentence petitioner to life imprisonment.

F.2d 320, 323 (3d Cir. 1992); *United States* v. *Lavender*, 602 F.2d 639, 641 (4th Cir. 1979); *United States* v. *Walker*, 557 F.2d 741, 746 (10th Cir. 1977); *United States* v. *Chaussee*, 536 F.2d 637, 644-645 (7th Cir. 1976); *United States* v. *Olvera*, 488 F.2d 607, 608 (5th Cir. 1973), cert. denied, 416 U.S. 917 (1974); *Hockenberry* v. *United States*, 422 F.2d 171, 174 (9th Cir. 1970). So long as the essential elements of the preemptive federal crime have been proved at trial and found by the jury, the absence of specific submission to the jury of the federal offense does not preclude the district court from entering a judgment of conviction. Cf. *Rutledge* v. *United States*, 116 S. Ct. 1241, 1250 (1996) ("[F]ederal appellate courts appear to have uniformly concluded that they may direct the entry of judgment for a lesser included offense when a conviction for a greater offense is reversed on grounds that affect only the greater offense. * * * This Court has noted the use of such a practice with approval.").

The federal murder statute provides that "[m]urder is the unlawful killing of a human being with malice aforethought," and that any murder that does not constitute first degree murder "is murder in the second degree." 18 U.S.C. 1111(a). In this case, the court of appeals correctly held that the government had proved, and the jury had found in returning its verdict on the assimilated state charge, all of the elements of federal second degree murder. J.A. 77-80. The court noted in particular that Section 1111(a)'s requirement of "malice aforethought" could be established by proof that petitioner acted with specific intent to inflict serious bodily injury. J.A. 78 & n.11.

That construction of the federal murder statute is consistent with the historical understanding of "malice aforethought." "The common-law crime of murder

was the unlawful killing of a human being with 'malice aforethought' or 'malice prepense,' which consisted of an intention to kill or grievously injure, knowledge that an act or omission would probably cause death or grievous injury, an intention to commit a felony, or an intention to resist lawful arrest." *Schad* v. *Arizona*, 501 U.S. 624, 648 (1991) (Scalia, J., concurring in part and concurring in the judgment). Accord, *e.g.*, O. Holmes, *The Common Law* 44 (Howe ed. 1963) ("malice aforethought" includes "[a]n intention to cause the death of, or grievous bodily harm to, any person") (quoting Stephen, *Digest of Criminal Law*); W. LaFave & A. Scott, *Criminal Law* 616 (2d ed. 1986) ("English judges came to hold that one who intended to do serious bodily injury short of death, but who actually succeeded in killing, was guilty of murder in spite of his lack of an intent to kill.").[16] The federal murder statute should be construed in a manner consistent with that historical understanding. See, *e.g.*, *United States* v. *Shabani*, 513 U.S. 10, 13 (1994) (noting "the settled principle of statutory construction that, absent contrary indications,

[16] See also 2 *Wharton's Criminal Law* 246-247 (15th ed. 1994) ("malice aforethought" encompasses, *inter alia*, "intent to cause great bodily harm"); R. Perkins, *A Re-Examination of Malice Aforethought*, 43 Yale L. J. 537, 552-555 (1934) (discussing established common law rule that intent to inflict great bodily injury suffices to establish malice aforethought, even if intent to kill is absent); H. Wechsler and Michael, *A Rationale of the Law of Homicide: I*, 37 Colum. L. Rev. 701, 702-703 (1937) (noting established rule that homicide was murder if done with an intent to cause death or grievous bodily harm); cf. *Lara* v. *Parole Comm'n*, 990 F.2d 839, 841 (5th Cir. 1993) ("malice aforethought" under federal murder statute includes "1) intent to kill; 2) intent to do serious bodily injury; and 3) extreme recklessness and wanton disregard for human life.").

Congress intends to adopt the common law definition of statutory terms.").

In accordance with the language of the Louisiana child murder statute, the district court instructed the jury that it could find petitioner guilty only if it found that she had "killed Jadasha D. Lowery" and that she had "acted with specific intent to kill or inflict great bodily harm." J.A. 31. In finding petitioner guilty on the basis of that instruction, the jury necessarily found all of the elements of second degree murder under 18 U.S.C. 1111(a). If petitioner's conviction on the assimilated state charge is held to be improper, the appropriate remedy is a remand for entry of a judgment of conviction on the federal offense of second degree murder.[17]

B. The court of appeals also held that there was no need for resentencing on the federal offense of second

[17] The indictment in this case charged that petitioner "did, with specific intent to inflict great bodily harm, commit first degree murder of Jadasha D. Lowery." J.A. 3. The indictment thereby alleged the essential elements of second degree murder under 18 U.S.C. 1111(a). The fact that the indictment relied (see J.A. 3-4; note 4, *supra*) on the ACA and Louisiana law, rather than on Section 1111(a), does not preclude entry of a judgment of conviction for federal second degree murder if the Court finds that disposition to be otherwise appropriate. "In order to determine whether an indictment charges an offense against the United States, designation by the pleader of the statute under which he purported to lay the charge is immaterial. He may have conceived the charge under one statute which would not sustain the indictment but it may nevertheless come within the terms of another statute." *United States* v. *Hutcheson*, 312 U.S. 219, 229 (1941). See Fed. R. Crim. P. 7(c)(3) ("Error in the citation or its omission shall not be ground for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to the defendant's prejudice.").

degree murder because petitioner's sentence of life imprisonment fell within the statutory maximum penalty for that offense. See J.A. 80. We do not agree. See Br. in Opp. 17-18 n.10. If the jury had found petitioner guilty of second degree murder under federal law, the district court would have been required to utilize the Sentencing Guidelines provisions applicable to that offense, and the court might have imposed a sentence below the statutory maximum.[18] An upward departure from that range, if appropriate, could reach the statutory maximum of a life sentence, but it is for the district court in the first instance to make such a determination. *Koon* v. *United States*, 116 S. Ct. 2035, 2045 (1996) (departures are reviewable only for abuse of discretion); cf. *Williams* v. *United States*, 503 U.S. 193, 205 (1993) (Guidelines appeal provisions did not transfer initial sentencing responsibility to courts of appeals). Resentencing under the Guidelines is therefore appropriate if this Court vacates petitioner's conviction on the assimilated state offense and orders entry of a judgment of conviction for federal second degree murder.

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[18] Sentencing Guidelines § 2A1.2 establishes a base offense level of 33 for second degree murder. After adding two points for the vulnerable victim adjustment, Guidelines § 3A1.1, petitioner's offense level would be 35, and her sentencing range, as an offender in Criminal History Category I, would be 166-210 months' imprisonment.

CONCLUSION

The judgment of the court of appeals should be affirmed. In the alternative, the judgment of the court of appeals should be vacated and the case remanded to the district court for entry of a judgment of conviction for second degree murder under 18 U.S.C. 1111(a), and for resentencing on that offense.

Respectfully submitted.

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SEPTEMBER 1997

(1)

No. 96-7151

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

DEBRA FAYE LEWIS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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REPLY BRIEF FOR PETITIONER

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ARGUMENT

I. PETITIONER WAS NOT PROPERLY CHARGED AND CONVICTED UNDER THE ASSIMILATIVE CRIMES ACT AND THE LOUISIANA FIRST DEGREE MURDER STATUTE.

The government argues that petitioner, DEBRA FAYE LEWIS, was properly charged and convicted of Louisiana first degree murder under the Assimilative Crimes Act (ACA). The question is whether the federal government can charge, prosecute, and convict a defendant under an assimilated state criminal statute whenever an exsting federal criminal statute proscribes and punishes the same conduct. The answer is that it cannot. In brief, the government states "in our view, a state offense is 'made punishable' by an act of Congress for purposes of the ACA only when a substantive federal statute focuses directly on the specific class of conduct that constitutes the state offense." (Reply br. 17)

What does this statement mean? If both federal and state criminal statutes make homicide (murder) punishable, has Congress "focus[ed] directly on the specific class of conduct that constitutes the state offense"? The answer obviously is that it has; therefore, the state criminal statute cannot be assimilated. The government's position focuses on the fact that if a substantive state criminal statute can make criminal a special class of criminal conduct not directly focused on by the federal criminal statute, then the government may assimilate the state criminal statute and prosecute the defendant under it. This is a misreading of the ACA itself and a clear misunderstanding of Congress' intent in enacting the ACA and the holdings of this Court in interpreting whether the ACA permits a federal prosecution to assimilate a state criminal statute when a similar federal criminal statute proscribes and punishes the same conduct. Petitioner contends that this interpretation of the ACA and its "harmonization" with federal law is inconsistent with this Court's holdings in *Williams v. United States*, 327 U.S. 711 (1946) and *United States v. Sharpnack*, 355 U.S. 286 (1958). In essence, the government's position would allow a federal

prosecutor to prosecute a defendant under an assimilated state criminal statute if that state criminal statute redefines, enlarges, or somehow classifies the criminal conduct differently from its federal counterpart. The implication of the government's argument is that not only does it have the right to charge and prosecute under an assimilated state criminal statute, but it can choose whether to charge or prosecute under fedral or state criminal law, depending on what result it desires to achieve. Obviously, this was never the intent of the ACA, and to hold that such a choice is available due to technical differences between a federal and state criminal statute renders the ACA and the federal criminal statute meaningless.

A. The Phrase "Act or Omission" in the ACA Refers to the Conduct of the Defendant Sought to Be Punished and Not to a State Law Offense.

The Assimilative Crimes Act, 18 U.S.C. § 13(a) provides:

> "Whoever within or upon any of the places now existing or hereafter reserved or acquired as provided in section 7 of this title . . . is guilty of any *act or omission* which, although *not made punishable by any enactment of Congress*, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment." (Emphasis added)

A plain reading of the ACA reveals that the words "act or omission" refer specifically to the conduct of the defendant sought to be punished and not to the state law offense that supports an ACA charge. Before the federal prosecutor can consider assimilating a state criminal statute, he or she must first look at the conduct of the defendant and determine whether there is an appropriate federal criminal statute which proscribes or prohibits that conduct. If that conduct is prohibited by a federal criminal statute, the defendant is charged under federal law

with a violation of the applicable statute. The inquiry ends there. However, if there is *no* federal criminal statute which prohibits or proscribes the conduct of the defendant, the prosecutor may assimilate an appropriate state criminal statute and prosecute the defendant under that state statute. Only if there is no federal criminal statute proscribing the conduct sought to be punished can the federal prosecutor assimilate a state criminal statute. If both federal and state criminal statutes proscribe the same conduct, the government must prosecute under the federal criminal statute.

This is consistent with the intent and purpose of the ACA, and the interpretation of the ACA by this Court. "There is, plainly, no delegation to the States of Authority in any way to change the criminal laws applicable to places over which the United States has jurisdiction." *Franklin v. United States*, 216 U.S. 559, 569 (1909).

The ACA was enacted by Congress, and subsequently re-enacted, to fill in the gaps in federal criminal law by assimilating state criminal laws in prosecutions for crimes committed against the United States on lands under its special maritime and territorial jurisdiction, when no federal criminal law existed. Therefore, rather than enacting a whole body of federal criminal law, Congress passed the ACA to fill in the gaps in federal criminal law by adopting or assimilating a state criminal statute for prosecution, if no federal criminal statute existed. The reasoning and purpose was simple. However, its application has been misunderstood, and in some cases, manipulated for other purposes. The rationale of the Assimilative Crimes Act is simple: to not allow persons to commit crimes on lands under the exclusive jurisdiction of the United States and go unpunished merely because Congress had not enacted a federal criminal statute proscribing that particular conduct.

To take the government's position and extend it further would mean that federal substantive criminal law would be subject to modification by reference to state

criminal law. The federal Constitution specifically empowers Congress to enact federal laws proscribing acts or conduct occurring on lands under its exclusive jurisdiction. Each individual state is also entitled to enact criminal statutes proscribing certain conduct and punishing that conduct on lands under its exclusive jurisdiction. Each sovereign (the state and the federal government) is free to legislate and enforce its own laws as long as they do not infringe on the other's sovereignty. Simply put, this is the basic principal of federalism. The states cannot change the federal criminal laws applicable to lands over which the federal government has exclusive jurisdiction.

In *Williams, supra*, this Court held that a man could not be charged under an assimilated Arizona criminal statute for conduct which occurred on land under exclusive federal jurisdiction (an Indian reservation) when a federal criminal statute proscribed and prohibited similar general conduct. The Arizona statute provided that a person could be found guilty of statutory rape if a male had sexual intercourse with a female (to whom he was not married) under the age of eighteen. However, the analogous federal criminal statute of carnal knowledge provided that the age of consent was sixteen. This Court held that the ACA did not make the Arizona statute defining statutory rape applicable because the "precise act" (the "act or omission") upon which the conviction depended (carnal knowledge) had already been made penal by an act of Congress. The fact that the Arizona statute more broadly defined the crime (age of consent being 18 years rather than 16 years under the federal statute) could not be used to enlarge the scope of the federal offense by application of the ACA.

This is what the government intends to do in the case at bar: redefine the federal murder statute in terms of the Louisiana murder statute. The Louisiana homicide statutes are similar in purpose and scope to those of its sister states and to the federal homicide statutes; it classifies murder into varying degrees and prescribes different pun-

ishments for the various degrees of murder. The government's argument suggests that if the Louisiana first degree murder statute defines the crime differently from the federal murder statutes, the government has the right to assimilate the state criminal statute and prosecute under state law rather than under the federal criminal statute. Whether the government argues that the Louisiana murder statute proscribes a different "class of conduct" or specifically seeks to deter child abuse, does not make the conduct any different from that proscribed by the federal murder statute.

Sharpnack, supra, stands for the proposition that a subsequently enacted federal criminal statute precludes the assimilation of a state criminal statute pursuant to the ACA. In other words, if at one point in time there was no federal criminal statute, the state criminal statute would supply the definition of the crime and the punishment for the proscribed conduct. However, once Congress subsequently enacts a statute defining and proscribing the conduct which had previously been proscribed and defined by an assimiliated state law, the federal statute "occupies the field" and "preempts" the assimilation of the state statute. Once a subsequent federal criminal statute is enacted by Congress, the federal prosecutor can no longer prosecute under a previously assimilated state criminal statute; the prosecution must rest upon the newly enacted federal statute. The issue of the applicability of the ACA is not how the crime is defined or whether there are technical differences between the federal and state criminal statutes, but whether the federal criminal statute proscribes the same conduct as does the state criminal statute. If the federal criminal statute applies, the prosecution must be based upon it and not on a state criminal statute.

The Louisiana homicide statute defines and classifies the conduct that constitutes first degree murder differently than the federal homicide statute. However, these differences are technical distinctions between what conduct or acts constitute the offense of first degree murder as op-

posed to second degree murder or manslaughter. These differences between federal murder and state first degree murder center on what acts constitute that specific class of offense, and what aggravating circumstances are present or absent in that classification for purposes of punishment. The federal first degree murder statute specifically proscribes the killing of a human being, including a child under the age of twelve years. The federal criminal statutes proscribe, define, and punish the conduct, "act or omission," and/or offense of murder. That federal legislation occupies the field, and a state criminal statute cannot be assimilated to modify or displace it. The purpose of the Assimilative Crimes Act is merely to make sure that a person does not commit an offense on federal property and go unpunished. (See, *United States v. Press Publishing Co.*, 219 U.S. 1, 12 (1910) in quoting Mr. Justice Story who helped draft portions of the 1825 Act which is essentially the same act as the ACA today.)

The Court of Appeals for the Fifth Circuit held that the government cannot assimilate a state criminal statute in a federal prosecution when a federal criminal statute proscribes the same conduct sought to be punished under state law. "Act or omission" under the ACA clearly refers to the criminal conduct which is sought to be proscribed and punished. The government argues that the Louisiana first degree murder statute defines murder of a child under the age of twelve years as a different class or category of murder than the federal degree murder statute; as such, the conduct for which petitioner was charged is not specifically proscribed by the federal murder statutes. Therefore, the state criminal law may be assimilated.

This argument falls of its own weight. The act or conduct sought to be prosecuted, and for which petitioner was tried, convicted and punished was for the murder of Jadasha D. Lowery, her four year old step-daughter. 18 U.S.C. § 111(a) defines, proscribes, and punishes the conduct known as murder. The statute classifies

(defines) first degree murder and second degree murder and it specifies the punishment for each depending on what aggravating circumstances are present or absent. The government makes the argument that the conduct being punished in this case is "child murder" which is somehow a different category of conduct from murder as defined by the federal murder statute. The federal murder statute does not classify or define the degrees of murder by the age of the victim. However, the Louisiana first degree murder statute does differentiate the crime of first degree murder from second degre murder due to the age of the victim,[1] by status[2] and whether the murder occurred during the perpetration or attempted perpetration of another crime.[3] Does the act of murder of a person under the age of twelve require a different type of conduct or create a different crime from the act of murder of a person who is over the age of twelve? The act (crime) of murder covers all persons regardless of age. Like the Arizona statute involved in *Williams*, supra, this Court has held that merely because a state statute redefines or enlarges the crime differently than the federal statute does not trigger the use of the ACA to prosecute under state law, provided that a federal criminal statute prohibits the conduct. The issue here is whether the conduct of murder is prohibited by the federal murder statutes and not whether the victim is of a certain age or within a certain class of persons. It does not change the argument for the government to suggest that by categoriz-

[1] 14 La. Rev. Ann. § 30A(5). "When the offender has the specific intent to kill or to inflict great bodily harm upon a victim under the age of twelve or sixty-five years of age or older."

[2] 14 La. Rev. Stat. Ann. § 30A(2). "When the offender has a specific intent to kill or to inflict great bodily harm upon a fireman or peace officer engaged in the performance of his lawful duties."

[3] 14 La. Rev. Stat. Ann. § 30A(1). "When the offender has specific intent to inflict great bodily harm and is engaged in the perpetration or attempted perpetration of aggravated kidnapping, second degree kidnapping, aggravated escape, aggravated arson, aggravated rape, forcible rape, aggravated burglary, armed robbery, drive-by shooting, first degree robbery, or simple robbery."

ing the murder of a child as first degree murder under Louisiana law, the state is prohibiting and punishing specific conduct not made criminal by the federal murder statute. A similar argument was rejected by this Court in *Davis v. Utah Territory*, 151 U.S. 262 (1893):

> This obligation is based in part, upon the theory that murder in the first degree and murder in the second degree are made distinct, separate offenses. But this is an erroneous interpretation of the statute. The crime defined is that of murder. The statute divides that crime into two classes in order that the punishment may be adjusted with reference to the presence or absence of circumstances of aggravation. [151 U.S. 262, 266 (1893)]

The classification of murder into different degrees, whether it be under the federal homicide statutes or state homicide statutes, is merely to rank this proscribed conduct into different classes to be subject to different punishments. This does not create a new specific offense of "child murder" which is not prohibited by federal criminal law.

B. The Offense of "Child Murder" Under Louisiana Law Is Certainly Made Punishable by the Federal Murder Statute.

The crucial question in this case is whether "child murder" as defined by Louisiana law is an offense made punishable by an enactment of Congress (and whether the government may invoke the ACA to assimilate the Louisiana first degree murder statute). The federal homicide statute proscribes and makes criminal the murder of "a human being." A human being may be of any age and includes those under the age of twelve as described in the Louisiana first degree murder statute and those over the age of twelve. It is logically insupportable to argue that the federal first degre murder statute does not proscribe and make criminal the murder of a human being (a child) under the age of twelve. The government, in brief, states "thus, the 'single offense' with which

petitioner was charged and convicted was child murder—a sub-category of first degree murder as defined by Louisiana law." (Reply br. 24) The argument furthered by the government is that the correct standard of reviewing whether this crime was made punishable by a federal statute is whether Congress directly focused on the specific class of conduct of murder of a child under the age of twelve. This analysis is unsound. The federal murder statutes proscribe and punish the crime of murder whether the victim is under the age of twelve or over the age of twelve. Under Louisiana law, murder of a human being under the age of twelve is not a "sub-category" of first degree murder as argued by the government, and it is not some separate and distinct offense not proscribed by the federal murder statutes. In Louisiana, the age of the victim is determinative for purposes of an enhanced penalty under the Louisiana first degree murder statute (the death penalty or life imprisonment without parole); an enhanced penalty due to a vulnerable victim is provided differently in the federal sentencing guidelines by an upward adjustment in the base offense level pursuant to § 3A.1.1 of the sentencing guidelines. No new and separate crime is created, only a more severe penalty is imposed. This is consistent with Louisiana law: ". . . the fact that a victim is under the age of twelve is now a statutory aggravating circumstance." *State v. Weiland*, 505 So.2d 702 (La. 1987), (Footnote omitted.) *Williams*, supra, found that state statutes cannot re-define or enlarge, or in this maner, sub-categorize federal law in order to invoke the ACA. If the prosecution should be allowed to invoke the ACA in light of "Congress' intent to minimize differences between the criminal law applicable to federal enclaves and those of surrounding areas," as the government contends, then why would Congress enact any federal criminal statutes whatsoever? The government's purpose is not to prosecute state crimes, but to prosecute criminal conduct against it on land under its exclusive jurisdiction. The exception to the rule is that if there is no federal criminal statute proscribing the conduct, then the assimilation of a state criminal statute is

permissible to prevent that conduct from going unpunished.

The government contends that the ACA's purpose is to promite conformity between state and federal criminal laws. That is true to the extent that it allows assimilation of and prosecution under state criminal statutes to prevent crimes occurring on federal enclaves from going unpunished. However, at no time does this conformity mean that if a federal criminal statute and a state criminal statute proscribe the same conduct, but the statutes differ in scope or punishment, the government has the right to decide which criminal statute to apply. To allow the federal prosecutor to charge and prosecute a defenadnt under the ACA with a state criminal statute may interfere little with the authority of the states regarding the definition of and the punishment of crimes committed within its borders. However, this prosecution under a state law thwarts Congress' intent that crimes against the federal government occurring on lands under its exclusive jurisdiction be punished under federal law. There is no federal interest secured by carrying on a prosecution based on an assimilated state criminal law when an appropriate federal criminal statute exists, nor does that prosecution further any legitimate state interest. The crime is against the government and not the state. It appears that the government wants this Court to hold that if a federal criminal statute does not proscribe *the exact act* or does not *define* the prohibited criminal act exactly as the state statute does, or does not provide the exact same punishment as the state statute, then the conduct is not the same precise conduct sought to be prohibited; and, therefore, the Assimilative Crimes Act allows the assimilation of and prosecution under a state criminal statute.

By their nature, criminal statutes differ in definition and punishment from one state to another and from their federal counterparts. The question is what criminal conduct is being prohibited. In this case, it is the crime of murder. Murder is not age specific; it may also include the killing of a child. Merely because the Louisiana

homicide statutes define different groups of persons for which a charge of first degree murder applies is not of any importance to the federal prosecution framework nor does it mean that the federal statute fails to prohibit murder; it merely means that the federal criminal statute categories and punishes this particular act differently than does the state statute. It means that the State of Louisiana has chosen to punish the killing of a child under the age of twelve by ranking that act in the class of acts described as first degree murder, which may receive a more severe punishment. However, the federal statute does not classify the degree of murder by reference to the age of the victim. It is clear that the federal statute encompasses all of the elements of murder of a child, including those who happen to be under the age of twelve. To argue that the ACA allows a federal prosecution under an assimilated state criminal statute when the only difference between that state statute and its federal counterpart is how each statute defines the degree of murder and the presence or absence of aggravating circumstances related to punishment, is unrealistic. Each sovereign is entitled to define and punish "acts or omissions" against it as it sees fit. This Court, in *Williams,* supra, found that:

> [t]he fact that the definition of this offense as enacted by Congress results in a narrower scope for the offense than that given to it by the State, does not mean that the Congressional definition must give way to the State definition. (327 U.S. 711, 717-18)

Congress, at any time, may re-define the crime of federal first degree murder and second degree murder. Likewise, a state may, at any time, re-define or change the elements of and punishment for its crimes. If we assume the government's position to be correct, then any time a state re-defines or changes its criminal statute, the corresponding federal statute would not then cover that precise act (crime). This position is flawed logically and in its application. By logic, this possibility was rejected by this court in *Sharpnack*, supra. There, this Court held that

if Congress enacts a federal criminal statute covering conduct on lands under its exclusive jurisdiction, the previously assimilated state laws are excluded from the field and the prosecution must then rely on those federal statutes. 355 U.S. 289 (1958). (See, particularly note 5 at p. 289 which specifically lists the federal murder statute as a re-enactment which excluded state murder laws from the field.) The government argues that the "precise act" which is used to determine whether the ACA allows the assimilation of a state criminal statute is directed toward the way that the criminal act is defined. The "precise act" test which has been approved by this Court goes toward the conduct that is sought to be punished. The Assimilative Crimes Act, in the same way, looks at the "act or omission" to determine whether federal law or state law applies. Clearly, the federal homicide statutes proscribe and prohibit the precise act, murder itself. Like the Louisiana homicide statutes, the federal statutes classify murder into different degrees and provide varying punishments for each of the different classes of murder. Merely because a state statute defines and punishes murder in different ways and in different degrees in no way changes the precise act or conduct sought to be prohibited by the federal statute.

The petitioner, DEBRA FAYE LEWIS, was charged with the murder of Jadasha Lowery. The precise act, the "act or omission," sought to be punished is the murder of a human being. Just because the Louisiana first degree murder statute defines first degree murder to include a human being under the age of twelve, does not make the murder itself some specific conduct not proscribed by the federal murder statute. The state definition merely seeks to specify a class of persons for which the charge of first degree murder applies and on whom a more severe punishment is imposed. Classification of murder into degrees or classes, does not create some separate or distinct conduct from murder in general.

C. Federal Prosecutors Cannot Assimilate a State Criminal Statute in Order to Obtain a More Severe Penalty for an Act Which Is Punished by a Federal Criminal Statute.

Petitioner contends that the reason the government assimilated the Louisiana first degree murder statute was to ensure a more severe sentence upon conviction, than provided by federal law. Both the federal murder statute and the Louisiana murder statute defines the degrees of murder and the punishment for each offense. However, the Louisiana first degree murder statute creates classes of persons for which the first degree murder statute applies irrespective of whether that crime would otherwise be second degree murder. In other words, you may be charged with, convicted of, and punished for first degree murder under Louisiana law for an act that would otherwise be second degree murder under Louisiana law, but for the fact that the victim is under the age of twelve. The federal first degree murder statute does not define degrees of murder by the age of the victim. The federal first degree murder statute makes the conduct of killing of a human being criminal, regardless of age. It is obvious that the federal homicide statutes encompass and make criminal the conduct which includes the murder of a child under the age of twelve. For the government to argue that because the Louisiana first degree murder statute somehow punishes the specific conduct of "child murder", this conduct is not otherwise punished or proscribed by federal law is erroneous.

The real purpose behind the federal prosecution's assimilation of the Louisiana first degree murder statute is to obtain an enhanced penalty in the sentencing phase of the prosecution. The record indicates, and the Fifth Circuit held, that there was insufficient evidence to convict DEBRA FAYE LEWIS of federal first degree murder. The federal prosecutor was aware of those facts prior to the indictment being handed down. Even if indicted for federal first degree murder, it was obvious that a conviction on that

charge would not be supported by the evidence, and, if obtained, would not survive an appeal. A review of the sentencing guidelines reveals the disparity in sentences between federal first degree murder (death, life imprisonment without parole) and second degree murder (168-210 months imprisonment, including a two level upward adjustment for a vulnerable victim). However, by charging petitioner with first degree murder under Louisiana law, she was subjected to life imprisonment without parole. A responsive verdict of second degree murder under Louisiana law carries a mandatory sentence of life imprisonment without parole. Section 5G1.1 of the sentencing guidelines in conjunction with 18 U.S.C. § 3553(b) provide that the sentence based upon an assimilated state statute should most closely approximate the state punishment rather than the sentencing guideline range. Therefore, the reason for assimilating the Louisiana first degree murder statute was to ensure a more severe punishment than what could reasonably be anticipated by a prosecution under federal law. The assimilation of the Louisiana criminal statute was not to prosecute conduct not made criminal by federal law, but to seek a more severe penalty not provided by federal law.

The ACA does not allow a federal prosecutor to statute shop in order to more easily secure a conviction for the proscribed conduct or to obtain a more severe punishment than what is available under the applicable federal criminal statute. In order for the prosecutor to assimilate the Louisiana first degree murder statute, there must not be a federal criminal statute which prohibits or proscribes the conduct which is sought to be prosecuted and punished. This is not the case here. The federal homicide statutes clearly prohibit and proscribe the conduct of murder of a human being, regardless of age, in a similar manner as the Louisiana statutes do. The clear intent in this case was to ensure that DEBRA FAYE LEWIS be convicted of Louisiana first degree murder, and a sentence of life imprisonment be imposed upon her pursuant to the sentencing guidelines.

Furthermore, the prosecution and sentencing of a defendant through an assimilated state criminal statute when a similar federal criminal statute exists, is contrary to the separation of powers between the federal government and the individual states. Each state is allowed to enact its own criminal statutes and punishments for their violation provided that these statutes do not violate the federal Constitution. The federal government, through acts of Congress may enact its own federal criminal statutes and punishments for acts against it as long as they do not violate the federal Constitution. If the Louisiana statute in this instance more severely punishes an individual for murder than does the corresponding federal criminal statute, and if the enhanced punishment is based upon the age of the victim, this alone does not make the conduct separate, distinct, or different from the conduct prohibited by the federal criminal statute. The proscribed conduct is the same: murder of a child, but the punishment is enhanced in the Louisiana statutory scheme by defining it as a more serious offense, first degree murder, as opposed to second degree murder subject to an upward adjustment of the base offense level, and ultimately the sentence, due to a vulnerable victim, under the federal sentencing guidelines. How can the government argue that the Louisiana first degree murder statute punishes "child murder" but the federal murder statute doesn't? How can the government contend that the "specific act" of child murder is not covered by the federal homicide statutes? It cannot! The government argues that because petitioner in brief stated that "the government could have prosecuted the defendant under the federal second degree murder statute and assimilated the state cruelty to juveniles statute as a separate charge had it so desired," Pet. Br. 18, she somehow "acknowledges that a state law offense may be prosecuted under the ACA even where the general conduct also violates a federal statute." Resp. Br. 24. The Louisiana

child abuse statute is not the same as, nor does it proscribe the same criminal conduct as the Louisiana first degree murder statute. The cruelty to juvenile statute is directed at punishing the specific crime of child abuse, not murder. The Louisiana first degree murder statute does not seek to prevent child abuse or punish it, but seeks to more severely punish the act of murder if the victim is under the age of twelve. These statutes are directed at separate and distinct conduct: one is to protect children and one is to determine in what types of murder the death penalty applies. In this case, there is no lack of a federal criminal statute which prohibits the precise act (the murder of a child). Therefore, the prosecution must be based on the appropriate federal criminal statute.

The difference between the federal criminal statute and the Louisiana criminal statute is that the Louisiana statute for purposes of sentencing automatically imposes a greater sentence (death or life imprisonment without parole) on a person who is found guilty of murdering someone under the age of twelve. Under federal law, no such distinction is made. However, under the correct circumstances, the exact same punishment is available under the federal first degree murder statute. The difference is that, unlike the Louisiana statute, it is not automatic because the victim is under the age of twelve years. The government improperly and incorrectly characterizes the "precise act" sought to be punished, the murder of a child under the age of twelve, as not being prohibited by federal law. For the government to argue that somehow the Louisiana murder statute proscribes conduct not made criminal by the federal homicide statutes is without merit.

It is clearly obvious that murder under federal law and murder under Louisiana law are the same thing. The only distinction is different classification of degrees of murder which is related solely to sentencing. It is an impermissible assimilation of a state criminal statute merely to accomplish a sentencing goal which is not provided by federal law. The Court of Appeals for the Fifth Circuit correctly

held that the government improperly assimilated the Louisiana first degree murder statute in its prosecution of petitioner, DEBRA FAYE LEWIS. That portion of the Fifth Circuit's opinion should be affirmed.

II. IF THIS COURT AFFIRMS THE HOLDING OF THE FIFTH CIRCUIT COURT OF APPEALS THAT THE ASSIMILATION OF LOUISIANA LAW WAS IMPROPER, THE CASE SHOULD BE REMANDED FOR RESENTENCING FOR THE FEDERAL OFFENSE OF SECOND DEGREE MURDER IN ACCORDANCE WITH THE FEDERAL SENTENCING GUIDELINES.

The United States Court of Appeals for the Fifth Circuit correctly held that the assimilation of the Louisiana first degree murder statute was improper. The Court of Appeals further held that there was sufficient evidence adduced at trial to convict the petitioner, DEBRA FAYE LEWIS of the federal offense of second degree murder and it entered a judgment of guilt of federal second degree murder.

Once the Court of Appeals found that the assimilation of the Louisiana first degree murder statute was improper, the options of the court were to reverse and vacate the conviction and sentence under the Louisiana first degree murder statute, and remand the proceedings for a new trial, or to affirm the conviction of the federal offense of second degree murder and remand the proceedings to the District Court for resentencing in accordance with the sentencing guidelines. The Fifth Circuit found that it was unnecessary to remand petitioner for sentencing because the sentence imposed by the District Court was within the maximum sentence provided by statute. This was clear error on the part of the Fifth Circuit.

The Fifth Circuit relied upon *Hockenberry v. United States*, 422 F.2d 171 (9th Cir. 1970) for the proposition that only if the indictment could not support the sentence, a remand for resentencing was necessary. The Court also relied upon *United States v. Hall*, 979 F.2d 320 (3rd Cir.

1992) to deny a remand for resentencing because the sentence imposed upon the defendant was not greater than which could have been imposed under the statute. The Fifth Circuit did not apply the sentencing guidelines to this case despite the fact that their application to federal offenses is mandatory. The Fifth Circuit's holding that the sentence imposed upon petitioner did not exceed the statutory maximum, and, therefore did not exceed the maximum sentence provided by statute is contrary to the holdings of this Court in *United States v. R.L.C.*, 503 U.S. 291 (1992) and *United States v. Granderson*, 511 U.S. 39 (1994). In both of those cases, petitioner contends that the definition of the statutory maximum sentence has been construed to mean the maximum sentence determined under the federal sentencing guidelines as applied by 18 U.S.C. § 3553(a)(4).

In the case at bar, the base offense level for second degree murder is a level 33, pursuant to U.S.S.G. § 2A1.2. An upward enhancement of two (2) levels to the base offense level for a vulnerable victim is permitted by U.S.S.G. § 3A1.1 increasing the base offense level to 35. As previously discussed in the brief of petitioner, Ms. Lewis' criminal history category was I, which under the sentencing guidelines produced a sentencing range for federal second degree murder from 168 to 210 months. Therefore, it is contended by petitioner that the maximum term of imprisonment applicable to the crime for which she was convicted is 210 months. However, the Fifth Circuit affirmed the sentence of life imprisonment without parole stating that the sentence did not exceed the statutory maximum provided by 18 U.S.C. § 1111(a). The minimum base offense level required to sustain a life imprisonment sentence under the guidelines is level 43, some eight base offense levels higher than what petitioner could receive for second degree murder.

The Fifth Circuit's holding that no remand for resentencing was necessary because the sentence imposed by

the District Court did not exceed the maximum sentence the defendant could have received under the applicable federal statute for second degree murder is erroneous. Under the federal sentencing scheme, the sentence is determined by application of the sentencing guidelines which is mandatory under 18 U.S.C. § 3553. As such, the Fifth Circuit's affirmance of a sentence of life imprisonment without parole violates 18 U.S.C. § 3553(b) and requires this court to vacate the sentence and remand the proceedings to the District Court for resentencing. It is obvious from reading the sentencing transcript and record of this matter that the District Court imposed a sentence based upon a sentencing guideline which did not apply in this case. Furthermore, the District Court imposed a sentence which was eight base offense levels above the applicable sentencing guideline range for the crime which the Fifth Circuit found petitioner guilty. The Fifth Circuit never applied the sentencing guidelines in determining petitioner's sentence.

A sentence of life imprisonment without parole exceeds the maximum sentencing guideline range for the crime of federal second degree murder upon which petitioner was convicted. To allow a sentence of life imprisonment to stand imposes an excessive sentence upon the defendant for the crime of which she was convicted. It must be remembered that the District Court imposed the life imprisonment sentence after determining the applicable sentencing guideline for a conviction of Louisiana first degree murder was the sentencing guideline for federal first degree murder: § 2A1.1. The sentence exceeded the statutory maximum guideline range for federal second degree murder. The sentence which was affirmed by the Fifth Circuit should be vacated and this matter remanded to the Fifth Circuit with an instruction that it should vacate the sentence of life imprisonment without parole and that this matter be remanded to the District Court for resentencing for federal second degree murder in accordance with the sentencing guidelines.

CONCLUSION

The opinion of the Fifth Circuit holding that the assimilation of the Louisiana first degree murder statute was improper should be affirmed.

The decision of the Fifth Circuit finding that the petitioner is guilty of the crime of federal second degree murder based upon an invalid indictment should be reversed and vacated and the matter remanded for a new trial. However, if this Court finds that the entry of a judgment of conviction of petitioner for federal second degree murder is proper under the evidence proven at trial and as found by the Court of Appeals, then the Fifth Circuit erred in refusing to vacate the sentence of life imprisonment without parole and remand this matter to the District Court for resentencing due to its failure to apply the sentencing guidelines to the conviction. The application of the sentencing guidelines to a federal offense is mandatory. The failure to apply the sentencing guidelines and to impose a sentence which is within the statutory maximum, but which exceeds the maximum provided by the applicable sentencing guidelines is error.

If this Court finds that the conviction of petitioner for federal second degree murder is proper, the sentence of life imprisonment without parole should be vacated and this matter remanded to the Fifth Circuit with instructions to vacate the sentence of life imprisonment without parole and to remand the case to District Court for resentencing in accordance with the federal sentencing guidelines.

Respectfully submitted,

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(8)

No. 96-7151

In the Supreme Court of the United States
October Term 1996

Debra Faye Lewis, Petitioner,

v.

United States of America, Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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19pp

QUESTION PRESENTED FOR REVIEW

May the Assimilative Crimes Act be used to prosecute crimes in federal district court under a state statute in order to obtain a higher sentence, where the conduct underlying the prosecution is also regulated by a federal statute that would result in a lower sentence under the federal Sentencing Guidelines?

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INTEREST OF THE AMICUS CURIAE[1]

The National Association of Criminal Defense Lawyers (NACDL) is a District of Columbia non-profit corporation with a membership of more than 9,000 attorneys and 28,000 affiliate members, including representatives from all fifty states. The American Bar Association recognizes the NACDL as an affiliate organization and awards full representation in its House of Delegates.

The NACDL was founded in 1958 to promote the study and research in the field of criminal defense law; to disseminate and advance knowledge of the law in the area of criminal practice; and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. NACDL seeks to defend individual liberties guaranteed by the Bill of Rights and has a keen interest in ensuring that legal proceedings are handled in a proper and fair manner. Among the NACDL's stated objectives is the promotion of the proper administration of criminal justice, and to ensure that federal statutes, such as the Assimilative Crimes Act, are construed and applied consistent with their language, Congressional purpose, and in accordance with due process.

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[1] Letters from the parties consenting to the filing of this brief are on file with the Clerk of this Court. In compliance with Rule 37.6, counsel of record for the NADCL authored this entire brief. In addition, no person or entity other than the National Association of Criminal Defense Lawyers (NACDL) has made any monetary contribution to the preparation or submission of this brief.

ADDITIONAL CONSTITUTIONAL PROVISION:

Art. I, Sec. 1. "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

SUMMARY OF ARGUMENT

The Court below erred in affirming the conviction for first degree murder under Louisiana law brought and tried in federal court under the Assimilative Crimes Act, 18 U.S.C. § 13; and the petitioner's sentence of life in prison without parole. The conduct that underlies the prosecution in this case, the killing of the petitioner's step-daughter on a federal military base, is regulated under the federal murder statute, 18 U.S.C. § 1111; and sentenced under the federal Sentencing Guidelines applied under 18 U.S.C. §3553(b). The Court of Appeals for the Fifth Circuit correctly reasoned that the petitioner's indictment under the Assimilative Crimes Act was improper, because under the "precise acts" test articulated by this Court in *Williams v. United States*, 327 U.S. 711 (1946), the conduct of killing a human being was covered by a federal statute, second degree murder under 18 U.S.C. § 1111, and the Assimilative Crimes Act could not be used to charge the petitioner in federal district court with a different state offense for the same conduct.

The Court of Appeals, erred, however, in affirming the conviction and sentence, because it determined there was no prejudice from being tried on a "flawed" indictment. The sentence the petitioner received in this case, life in prison without parole, is the minimum sentence for both first and second degree murder under Louisiana

law. It is not, however, the mandated sentence for a conviction for second degree murder under federal law. In fact, a sentence of life in prison for a conviction of federal second degree murder is, under the sentencing guidelines for the petitioner, an erroneous and illegal sentence under 18 U.S.C. § 3553(b). The finding by the Fifth Circuit that petitioner suffered no prejudice is therefore erroneous.

ARGUMENT

I. The Fifth Circuit correctly concluded that under the "precise acts" test, the petitioners were erroneously charged and convicted in federal district court for murder under a Louisiana statute

The Fifth Circuit properly held that under the "precise acts" test followed by the majority of federal circuits,[2] the petitioner was improperly charged and convicted under the Assimilative Crimes Act, 18 U.S.C. § 13, with murder under a Louisiana statute.[3] The Fifth Circuit correctly reasoned that the "precise act" with which the petitioner was charged, the killing of a human being, was conduct covered by the federal murder statute, 18 U.S.C. § 1111. The fact that Louisiana has added additional elements to its murder statute, in this case the killing of a child under the age of twelve, did not permit the district court to find that the conduct regulated by the two statutes was different, and therefore the

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[2] The "majority view" was discussed by the Court of Appeals In *United States v. Lewis*, 92 F.3d 1371, 1374 n.4 (5th Cir. 1996). It contrasted the holdings of the Second, Sixth, Ninth, Tenth, and Eleventh Circuits with the minority "generic conduct" view of the Eighth Circuit.

[3] La.Rev.Stat. § 14:30A(5).

petitioner was improperly charged and convicted in federal district court under the Assimilative Crimes Act for the murder of a child under Louisiana law.

This result comports not only with prior decisions of this Court, particularly *Williams v. United States*, 327 U.S. 711 (1946), but also the general nature of federalism and Congress's exclusive power under Art. I, sec. 1 of the Constitution to enact federal criminal legislation in federal enclaves. The precise conduct on a federal enclave was the killing of a human being. Congress has prohibited this precise conduct at 18 U.S.C. § 1111. Louisiana has made a separate determination on how to define and punish that precise conduct, and has added to its first degree murder statute its own separate element of the killing of a child under the age of twelve. Congress, however, has not made that further distinction, and only Congress must do so if the precise conduct of murder is prosecuted in a federal enclave. To hold otherwise would permit each individual state to preempt what is exclusively the concern of Congress, and to allow an individual district court to effectively legislate what statute to apply to the same conduct already considered by Congress.

This Court in *Williams* faced the almost identical situation as here, where petitioner was charged under the Assimilative Crimes Act with having sexual intercourse on the Colorado Indian Reservation in Arizona with a girl who was over sixteen but under eighteen. The crime that was assimilated was the then-applicable section 43-4901 of the Arizona Criminal Code, which expanded the definition of "statutory rape" to include sexual intercourse with a girl under the age of eighteen. The same conduct was prohibited by the then-applicable federal statutory

rape statute, 18 U.S.C. § 458, except that the girl had to be under the age of sixteen, not eighteen. This Court held that the Assimilative Crimes Act did not apply because (1) the precise acts upon which the conviction depended had been made penal by the laws of Congress defining adultery and (2) the offense known to Arizona as that of "statutory rape" had been defined and prohibited by the Federal Criminal Code, and could not to be redefined and enlarged by the application of the Assimilative Crimes Act. 327 U.S. at 717.

The same situation exists here. The conduct that is criminalized by the Louisiana murder statute, the killing of a human being, is criminalized under 18 U.S.C. § 1111. The fact that Louisiana has expanded that conduct to define the killing of a child as an element of first degree murder, where such an element does not exist under the federal murder statute, does not permit the Assimilative Crimes Act to be used to redefine and enlarge the application of the federal murder statute. That is the prerogative solely of Congress under Art. I, Sec. 1 of the United States Constitution. This Court in *Williams* noted that

> Arizona's definition of rape and the punishment that Arizona prescribes for its commission differ from those relating either to rape or carnal knowledge under the Federal Criminal Code. These differences well illustrate the confusing variations from the definition of a federal crime and from the provisions for its punishment which would have to be considered if indictments were permitted under the Assimilative Crimes

> Act for every act committed within a federal enclave and which might come within a State's enlargement of the federal definition of the same offense.

327 U.S. at 717, n.11.

This is precisely the danger presented by the use of the Assimilative Crimes Act in this case. The common law crime of murder has been redefined by most jurisdictions and has specific elements that distinguish varying degrees and punishments by jurisdiction. To allow the Assimilative Crimes Act to become a tool by which the federal murder statute can be redefined would result in the same "confusing variations" that this Court expressly prohibited by the application of the "precise acts" test in *Williams*.

In a later decision of this Court construing the Assimilative Crimes Act, *United States v. Sharpnack*, 355 U.S. 286 (1958), this Court distinguished between a permissible act of Congress allowing those acts not regulated by Congress to be covered by subsequently revised state statutes, and the unconstitutional delegation of Congressional authority to the states to regulate conduct already regulated by Congress. This Court cited *Williams* with favor on the issue here, where a state law conflicts with a specific federal criminal statute. *Id.* at 293, n.9. The dissent by Justices Douglas and Black stated that allowing Congress to index the Assimilative Crimes Act to subsequently adopted state legislation was, in fact, an unconstitutional delegation of Congressional authority to the states. *Id.* at 296. The majority disagreed, but only as to those acts and conduct not already regulated by Congress, as the Court had previ-

ously held in *Williams*. To hold otherwise would be to allow states to redefine and rewrite conduct within a federal enclave that Congress had already considered and regulated by a specific federal criminal statute.

The brief of the respondent in its opposition to the grant of certiorari argues that the "precise conduct" in this case, the killing of a child, is different than that regulated by the federal murder statute and therefore properly brought under the Assimilative Crimes Act. This same argument was considered and rejected by the Fifth Circuit. The brief of the respondent in opposition makes a novel distinction between "primary" conduct regulated by the federal murder statute, and "the specific problem that is the subject of the state law sought to be assimilated." [Respondent's Brief in Opposition, pp.10-11.] The "specific problem" that was considered by the Louisiana legislature in its definition of the elements of first degree murder, was that "children . . . are in the category of persons needing special protection" [Respondent's Brief in Opposition, p. 11.] Congress, however, *did* consider this factor, but applied it differently. Under U.S.S.G. § 3A1.1, a sentence in a criminal case, including that of second degree murder, must be aggravated by two offense levels if the district court finds that

> the defendant knew or should have known that a victim of the offense was unusually vulnerable due to age, physical or mental condition, or that the victim was particularly susceptible to the criminal conduct.

Age of the victim is precisely the aggravating factor considered by the Louisiana legislature in redefining its murder statute to make the killing of a person under the

age of twelve an element of its first degree statute. Louisiana is free to define and punish this conduct one way, and Congress, under Art. I, Sec. 1 of the Constitution, is free to do it another.

Congress is quite capable of redefining common law crimes and adding specific elements to newly enacted legislation based upon age when it deems it appropriate. For example, Public Law 99-646, which repealed the previously defined federal crime of rape at 18 U.S.C. § 2031, abolished the common law crime of rape and redefined the conduct as sexual abuse. That legislation created Chapter 109A of the Federal Criminal Code and within it defined differing crimes, with different elements and punishments, for sexual acts committed within federal jurisdiction. For example, the common law crime of rape is now defined as aggravated criminal sexual abuse at 18 U.S.C. § 2241(a), requires the use of force or threat, and has a statutory penalty of imprisonment for a term of years or life, or both. Such an act with children under the age of twelve is defined at 18 U.S.C. § 2241(c). That section, by contrast, does not require the use of force or threat, but carries the same penalty as section 2241(a). Were Congress so inclined, it, too, could redefine the common law crime of murder to include the elements set forth by Louisiana in its murder statute. So far it has not, and the Assimilative Crimes Act cannot be used to second guess or selectively amend Congress's unique authority under Art. I, Sec. 1 of the Constitution to rewrite a statute because the district court desires to rewrite or redefine the conduct that is regulated and prosecuted in federal court.

II. The Fifth Circuit erred in finding no prejudice to the petitioner, even though the petitioner was sentenced to life imprisonment without parole for a conviction for second degree murder under 18 U.S.C. § 1111.

The Fifth Circuit affirmed the petitioner's conviction and sentence for murder, because it concluded that the petitioner suffered no prejudice as a result of her prosecution under the Assimilative Crimes Act. The controlling factor the Fifth Circuit used was that the life sentence received by the petitioner was no greater than the statutory maximum for second degree murder set forth at 18 U.S.C. § 1111. This ruling was error, and cannot be reconciled with this Court's decisions in *United States v. R.L.C.*, 503 U.S. 291 (1993), and *United States v. Granderson*, 511 U.S. 39 (1994). In both cases, this Court construed "statutory maximum" to be the maximum sentence determined under the Sentencing Guidelines as applied by 18 U.S.C. § 3553(a)(4).

In *R.L.C.*, the issue was "maximum term of imprisonment" under 18 U.S.C. § 5037(c)(1)(B). This Court concluded that "maximum term of imprisonment" should be construed not as the maximum specified in a particular statute, but as the maximum sentence required after application of the Sentencing Guidelines under 18 U.S.C. § 3553(b). 503 U.S. at 294. In the context of *R.L.C.*, that meant that a juvenile could not be detained under 18 U.S.C. § 5037(c)(1)(B) for a period longer than twenty-one months, the maximum authorized under the Sentencing Guidelines, even though the statutory maximum for the corresponding federal offense, involuntary manslaughter, under 18 U.S.C. 1112(b), was three years.

In *Granderson*, this Court held that the proviso, at 18 U.S.C. § 3565(a), requiring imposition of a prison term of one-third the originally applicable sentence after a probation revocation based upon drug use, was limited by the maximum guideline range of six months imprisonment available at the original sentencing, not one third of the probationary sentence of five years. The Court affirmed the decision of the Eleventh Circuit, which had vacated the sentence of twenty months imposed at the probation revocation, one third the sixty-month probationary sentence, and remanded for resentencing to no more than one-third the original maximum guideline of six months.

The Fifth Circuit relied upon pre-Guideline cases in holding that no remand was required for resentencing because "[r]esentencing is only required where the district court has imposed a sentence that exceeded the maximum sentence the defendant would have received if sentenced under the applicable federal statute." *United States v. Lewis*, 92 F.3d 1371, 1379 (5th Cir. 1996). The determination of the "maximum sentence," however, has changed with the adoption of the Sentencing Reform Act of 1984 (Pub.L. No. § 98-473), which amended 18 U.S.C. § 3553, and created the Sentencing Guidelines. In this case, the maximum sentence the petitioner could receive for second degree murder was 210 months, not life imprisonment.[4] The sentence imposed, life in prison without parole, corresponds to offense level 43 under the

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[4] The offense level for second degree murder under U.S.S.G. § 2A1.2 is level thirty-three. With an additional two levels under U.S.S.G. § 3A1.1 to reflect the age of the victim, the adjusted offense level becomes level thirty-five. The petitioner has no prior criminal record, placing her in criminal history category I. That produces a sentencing range of 168-210 months in prison.

Sentencing Guidelines, an upward departure of eight offense levels.[5] Had the petitioner been convicted of federal second degree murder, and received a sentence of life without parole, the sentence imposed would violate 18 U.S.C. § 3553(b), and remand for resentencing would be required under this Court's decision in *Williams v. United States*, 503 U.S. 193 (1993).

In *Williams*, this Court held that where a district court departs from the Guidelines for proper and improper reasons, the sentence imposed must be vacated and remanded for resentencing unless it can be shown that the errors of the district court would not affect the sentence. In this case, the district court imposed a sentence eight levels offense above the applicable sentencing range, and gave no reason except the erroneous one that the petitioner was properly convicted in federal court of murder under a Louisiana statute that required a sentence of life in prison without parole. As previously discussed in the first section of this brief, the prosecution of the petitioner in federal district court under the Assimilative Crimes Act was error, and cannot be a factor for an upward departure. To hold otherwise would

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[5] The minimum sentence for both first (La.Rev.Stat. §14:30C) and second (La.Rev.Stat. §14:30.1) degree murder in Louisiana is "life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence." A sentence of life in prison under federal law, after the passage of the Sentencing Reform Act of 1984, is also without parole. *United States v. Gonzalez*, 922 F.2d 1044, 1051 (2d Cir. 1990), *cert. denied*, 502 U.S. 1014 (1991); *United States v. Donley*, 878 F.2d 734, 739-740 (3d Cir. 1989), *cert. denied*, 494 U.S. 1058 (1990); *United States v. Analla*, 975 F.2d 119, 126-127 (4th Cir. 1992), *cert. denied*, 507 U.S. 1033 (1993); *United States v. LaFleur*, 971 F.2d 200, 208-209 (9th Cir. 1991), *cert. denied*, 507 U.S. 924 (1993); *United States v. Sands*, 968 F.2d 1058, 1066 (10th Cir. 1992), *cert. denied*, 506 U.S. 1056 (1993).

be to permit unauthorized sentences based upon state criminal statutes for conduct already regulated by Congress and governed by the federal Sentencing Guidelines. Not only would this evade the concerns this Court expressed over fifty years ago in *Williams v. United States*, 327 U.S. 711 (1946), but it would also circumvent the underlying purpose of the federal Sentencing Guidelines and the Sentencing Reform Act of 1984 to insure uniformity at sentencing.

The one post-Guideline case relied upon by the Fifth Circuit, *United States v. Hall*, 979 F.2d 320 (3d Cir. 1992), concerned a prosecution under the Assimilative Crimes Act where the sentence imposed was forty-five days and the statutory maximum for the corresponding federal statute was six months. A crime with a maximum sentence of six months or less, however, is a petty offense under 18 U.S.C. § 19, and is not covered by the Sentencing Guidelines under 18 U.S.C. § 3553(b) and 28 U.S.C. § 994(w). This Court's guideline decisions in *Granderson, R.L.C., and Williams*, therefore, would not apply in *Hall*, because in that case there would be no "guideline" maximum by which to determine the statutory maximum. Here, however, there is, and the petitioner's sentence of life imprisonment without parole is clearly in excess of the applicable guideline maximum. That is severe prejudice, and requires that the petitioner's conviction and sentence under the Assimilative Crimes Act for murder under La.Rev.Stat. § 14:30A(5) be vacated. The case should be remanded to the Fifth Circuit with directions that the conviction and sentence imposed under the Assimilative Crimes Act be vacated and this case remanded to the district court for further proceedings with directions that in the event the petitioner is resentenced, she receive a sentence of no more than 210 months in prison.

CONCLUSION

The opinion of the Fifth Circuit, that the petitioner was improperly convicted under the Assimilative Crimes Act, should be affirmed. Her conviction for murder under the Assimilative Crimes Act and the sentence of life in prison without parole should be vacated and this matter remanded to the Fifth Circuit with directions that the case be remanded to the district court for further proceedings.

Respectfully submitted,

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